No. 02-29-CFX Title: Immigration and Naturalization Service, Petitioner
v.
Fredy Orlando Ventura

Docketed: July 5, 2002 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Apr 25 2002	Application (01A813) to extend the time to file a petition for a writ of certiorari from May 5, 2002 to June 4, 2002, submitted to Justice O'Connor.
	Apr 25 2002	Application (01A813) granted by Justice O'Connor extending the time to file until June 4, 2002.
	May 24 2002	Application (01A813) to extend further the time to file a petition for a writ of certiorari from June 4, 2002 to July 4, 2002, submitted to Justice O'Connor.
	May 28 2002	Application (01A813) granted by Justice O'Connor extending the time to file until July 4, 2002.
	Jul 5 2002	Petition for writ of certiorari filed. (Response due August 4, 2002)
	Aug 2 2002	Brief of respondent Fredy Orlando Ventura in opposition filed.
	Sep 10 2002	Reply brief of petitioner Immigration and Naturalization Service filed.
	Sep 11 2002	DISTRIBUTED for Conference of September 30, 2002
	Oct 7 2002	REDISTRIBUTED for Conference of October 11, 2002
	Oct 15 2002	REDISTRIBUTED for Conference of October 18, 2002
	Oct 18 2002	Record filed.
	Oct 28 2002	REDISTRIBUTED for Conference of November 1, 2002
	Nov 4 2002	Petition GRANTED. Judgment REVERSED. Opinion per curiam. (Detached opinion.)

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Supreme Court, U.S.
FILED

02 - 29 JUL 5 2002

No.

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

FREDY ORLANDO VENTURA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals exceeded the scope of its review when, having overturned a determination by the Board of Immigration Appeals (BIA) that an alien had not established persecution on account of a protected characteristic for purposes of obtaining asylum or withholding of deportation from the United States, the court itself decided the remaining legal and factual issues relevant to the alien's eligibility for asylum and withholding of deportation, rather than remanding the case to the BIA for it to address those issues in the first instance.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 264 F.3d 1150. The order of the Board of Immigration Appeals (App., *infra*, 14a-16a) and the oral decision of the immigration judge (App., *infra*, 17a-23a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2001. A petition for rehearing was

denied on February 4, 2002 (App., *infra*, 24a). On May 28, 2002, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including July 4, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(42)(A), provides in pertinent part:

> The term "refugee" means * * * any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]

2. Section 1105a of Title 8 of the United States Code (1994) provided in pertinent part:

> **Judicial review of orders of deportation and exclusion**
>
> **(a) Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States * * * , except that—
>
> * * * * *

> **(4) Determination upon administrative record**
>
> * * * the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive[.]

3. Section 1158(a) of Title 8 of the United States Code (1994) provided:

> **Establishment by Attorney General; coverage**
>
> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

4. Section 1253(h) of Title 8 of the United States Code (1994) provided in pertinent part:

> **Withholding of deportation or return**
>
> (1) The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT

1. a. The Immigration and Nationality Act (INA) defines the term "refugee" to mean an alien who is unwilling or unable to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). An alien who is a refugee is eligible to be considered for asylum in the United States, provided that the alien is not disqualified from consideration because of past conduct. See 8 U.S.C. 1158 (1994).[1] The Attorney General is vested with discretion whether to grant asylum to an eligible refugee. 8 U.S.C. 1158(a) (1994).

The asylum applicant has the burden of proving that he is a refugee. 8 C.F.R. 208.13(a). An asylum applicant who establishes that he suffered past persecution on account of a statutorily protected characteristic is rebuttably presumed to have a well-founded fear of future persecution. 8 C.F.R. 208.13(b)(1). That presumption may be rebutted if the immigration judge (IJ) finds that (1) there has been a fundamental change in circumstances such that the asylum applicant no longer

[1] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-575 to 3009-627, revised the INA's provisions for obtaining relief from deportation. See, *e.g.*, 8 U.S.C. 1158 (1994); 8 U.S.C. 1231(b)(3). In Section 304(a) of IIRIRA, 110 Stat. 3009-587 to 3009-593, Congress established a new form of proceeding known as "removal," which applies to aliens who have entered the United States but are deportable, as well as to aliens who are excludable at the border. See 8 U.S.C. 1229, 1229a. Those amendments do not govern the present case because they apply only to applications filed by aliens who were placed in removal proceedings on or after April 1, 1997. IIRIRA § 309(a), 110 Stat. 3009-625.

has a well-founded fear of persecution on account of one of the protected grounds, or (2) the applicant could avoid future persecution by taking reasonable steps to relocate within the country of removal. *Ibid.* The IJ's asylum decision—like other rulings by an IJ in deportation proceedings brought against the alien—is appealable to the Board of Immigration Appeals (BIA). The BIA has the power to conduct a de novo review of the record, to make its own findings of fact, and to determine independently the sufficiency of the evidence. See, *e.g.*, *Elnager* v. *INS*, 930 F.2d 784, 787 (9th Cir. 1991).[2]

b. If the Attorney General determines that an alien's "life or freedom would be threatened" in the country of deportation on account of race, religion, nationality, membership in a particular social group, or political opinion, the alien may be eligible for "withholding of deportation or return." 8 U.S.C. 1253(h)(1) (1994). To be entitled to withholding of deportation, the alien must demonstrate a "clear probability of persecution." *INS* v. *Stevic*, 467 U.S. 407, 430 (1984); 8 C.F.R. 208.16(b) (applicant bears burden of proving eligibility for withholding). If the alien makes such a showing, withholding of deportation (unlike the discretionary relief of asylum) is mandatory. 8 U.S.C. 1253(h)(1) (1994).

2. Respondent is a native and citizen of Guatemala who was born in 1971. App., *infra*, 2a; A.R. 141 (translation of birth certificate). In August 1993, respondent crossed the United States border unlawfully and without inspection, and entered Texas. A.R. 162. Respon-

[2] An asylum claim filed by an alien who has not yet been placed in removal proceedings is decided by an asylum officer. See 8 C.F.R. 208.2, 208.9-208.12. Asylum officers' decisions are not appealable to the BIA.

dent applied for asylum in the United States, asserting that he feared he would be killed by members of a Guatemalan guerrilla organization if he was returned to Guatemala. A.R. 129, 134. In October 1994, an asylum officer notified respondent that the Immigration and Naturalization Service (INS) intended to deny him asylum and withholding of deportation. A.R. 129-131; App., *infra*, 19a; see note 2, *supra*.

In August 1995, the INS served respondent with an order to show cause why he should not be deported from the United States. A.R. 162-166. In October 1996, an IJ held a hearing at which respondent conceded that he is deportable from the United States but requested a hearing on his earlier asylum application. A.R. 37-39.

At an evidentiary hearing held in February 1998, respondent testified that, on a total of three occasions in 1992 and 1993, a Guatemalan guerilla group had left messages at his house that implied that harm would come to respondent or his family if he did not join the guerillas' cause. Respondent testified that he did not want to join the guerillas because his family members were allied with the Guatemalan army. Respondent also testified that he believed that the guerillas singled him out because members of his family, including a cousin to whom respondent is close, served in the Guatemalan military. Respondent stated that his uncle was a military commissioner who was attacked in the 1980s by persons whom the family believed to be guerillas; that one of respondent's cousins was killed by guerillas in 1988; and that a friend who lived near respondent was murdered in 1993 when he refused to join the guerillas. App., *infra*, 2a-3a, 20a-21a.

The INS introduced a State Department report about human-rights conditions in Guatemala in 1997, which stated that the Guatemalan guerillas signed

peace accords with the Guatemalan government in 1996 and that, although guerilla groups continued to make death threats in 1996, the groups were disbanding. The State Department report indicated that only leaders or high-profile supporters of Guatemalan political parties were likely to suffer harassment by the guerillas based on their political opinion—and they often could avoid the harassment by relocating within Guatemala. A.R. 59-67.

The IJ found respondent's testimony credible but denied his application for asylum and withholding of deportation. App., *infra*, 19a-20a, 22a-23a. The IJ found (*id.* at 22a) this case to be controlled by *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992), in which this Court held that an alien who refused to join a Guatemalan guerilla group out of a fear that he would be punished by the government, and who feared retaliation by the guerillas for refusing to join their group, had not established persecution on account of political opinion or any other protected ground, and therefore was not entitled to refugee status or asylum. See *id.* at 481-484. As an additional basis for her decision, the IJ in this case also held that, "[i]n view of changing country conditions" in Guatemala, respondent had failed to demonstrate "that even if the guerillas, in fact, had an interest in him in the past, that they would continue to have motivation and inclination to persecute him in the future." App., *infra*, 22a.

3. The BIA dismissed respondent's appeal. App., *infra*, 14a-16a. The BIA held in a per curiam order that respondent had not provided anything more than his own speculative opinion that the guerillas threatened him on account of his contacts with the Guatemalan army (or any other protected characteristic). *Id.* at 15a. The BIA therefore determined that it was not neces-

sary to address respondent's further argument that conditions in Guatemala had not changed materially since he left that country in 1993. *Ibid.*

4. The United States Court of Appeals for the Ninth Circuit granted respondent's petition for review and awarded him eligibility for the discretionary relief of asylum, as well as mandatory withholding of deportation. App., *infra*, 2a, 13a. First, the court of appeals found it "clear from the record" that the guerillas' threats against respondent and their efforts at forced recruitment constituted persecution of respondent. *Id.* at 5a-6a. Next, the court held that the past persecution was on account of a political opinion that the guerillas imputed to respondent, and therefore supported a claim to refugee status. See *id.* at 6a-10a. The court stated that respondent "presented credible, uncontradicted testimony that the guerrillas threatened him on account of his imputed anti-guerrilla beliefs," and that "the record establishes that [respondent] * * * had an identifiable political opinion—anti-guerilla sympathy for the military." *Id.* at 7a. The court therefore concluded that the record evidence "compels" a finding that respondent was persecuted in Guatemala on account of an imputed political opinion. *Ibid.*

The court of appeals rejected the IJ's reliance upon *Elias-Zacarias*. The court reasoned that respondent's claim is "far different" from the asylum claim that was rejected by this Court because the alien in *Elias-Zacarias*, unlike respondent, did not offer evidence that he had an actual or imputed political motive for resisting the guerillas' recruitment. App., *infra*, 8a-9a.

The court of appeals then invoked the rebuttable presumption of a well-founded fear of future persecution that arises under administrative regulations from a showing of past persecution. App., *infra*, 10a-11a; see

8 C.F.R. 208.13(b)(1). The court acknowledged that the BIA—having determined that any persecution of respondent was not on account of a protected characteristic—did not address the significance of changed conditions in Guatemala. App., *infra*, 11a. But the court nevertheless declined to remand the case to the BIA to consider that question in the first instance, relying on Ninth Circuit precedent that a remand is not called for "when it is clear that we would be compelled to reverse the BIA's decision if the BIA decided the matter against the applicant." *Ibid.* (citing *Navas* v. *INS*, 217 F.3d 646, 662 (9th Cir. 2000)).

In this case, the court determined, there was only one conclusion that the BIA could permissibly reach. App., *infra*, 11a-13a. The court reasoned that, based upon the 1997 State Department report, political persecution by Guatemalan guerillas had not ended entirely. Therefore, according to the court, "we cannot say the risk to [respondent] of future persecution on account of an imputed political opinion has been so minimized as to rebut the presumption of such persecution." *Id.* at 12a. On that basis, the court of appeals held that respondent is eligible to be considered by the Attorney General for a grant of asylum, and is entitled to withholding of deportation to Guatemala. *Id.* at 13a.

On February 4, 2002, the court of appeals denied the government's timely petitions for rehearing and rehearing en banc. App., *infra*, 24a.

REASONS FOR GRANTING THE PETITION

1. The question presented for review in this case is whether, once a court of appeals rejects the Board of Immigration Appeals' particular grounds for finding that an asylum applicant failed to establish past persecution based upon a protected characteristic, the

court should remand to the BIA for further proceedings, rather than itself adjudicate the applicant's eligibility for relief. The pending petition in *INS* v. *Chen*, No. 02-25 (filed July 3, 2002), presents the same question. In *Chen*, the court of appeals found inadequate the BIA's reasons for deciding that the alien did not provide credible testimony concerning past persecution in China, in support of his application for asylum and withholding of removal. Instead of remanding to the BIA for further proceedings, the court then made de novo determinations that the alien in fact had suffered past persecution on the basis of a protected characteristic, that the INS had not rebutted the resulting presumption of future persecution, and that the alien was eligible for relief. The petition in *Chen* asks this Court to review the court of appeals' reversal of the BIA's adverse credibility finding (Question 1), as well as the court of appeals' failure to remand the case to the BIA once it rejected the the BIA's basis for denying asylum and withholding of removal (Question 2). The second question presented in *Chen* involves the same legal issue as the question presented in this petition.

2. In this case, the court of appeals reversed the BIA's determination that respondent failed to carry his burden of proving that the persecution he alleged was on account of political opinion.[3] The court of appeals

[3] The court of appeals' overturning of the BIA's reasonable factual determination that respondent failed to carry his burden of proof on the past-persecution issue was error, for many of the same reasons that it was error for the Ninth Circuit to overturn the BIA's adverse credibility determination in *Chen*. See Pet. at 13-19, *Chen*, *supra*, (No. 02-25). The government does not, however, seek further review on this issue. In December 2000, the INS proposed, among other new regulations, a regulation that would address what an asylum applicant must show in order to establish, in the context of a persecutor with mixed motivations, that the persecution was on account of the applicant's protected characteristic. See 65 Fed. Reg. 76,588, 76,597-76,598 (2000) (proposing new 8 C.F.R. 208.15(b)). The INS presently is considering public comments received on its proposed regulations.

recognized (App., *infra*, 11a) that its holding compelled additional factual findings about issues that the BIA, given its own view of the evidence, did not need to address. In such a situation, a court of appeals "is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985). Rather, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Ibid.* Just as the Ninth Circuit erred by undertaking de novo fact-finding in *Chen* (see Pet. at 20-27, *Chen*, *supra* (No. 02-25)), the court of appeals should have remanded this case to the BIA, rather than proceeding to determine whether the evidence currently in the record concerning changed conditions in Guatemala overcomes the rebuttable presumption arising from the court's finding of past persecution.

As the petition in *Chen* also explains (at 22-23), the Ninth Circuit's de novo resolution of asylum and withholding-of-removal issues not decided by the BIA is a recurring error that warrants intervention by this Court. The recurring error, moreover, puts the Ninth Circuit in conflict with other courts of appeals, which generally respect the BIA's role as fact-finder by remanding to the BIA in similar situations. See, *e.g.*, *Begzatowski* v. *INS*, 278 F.3d 665, 671 (7th Cir. 2002) (remanding after reversing BIA finding of no past persecution); *Yang* v. *McElroy*, 277 F.3d 158, 162 (2d

Cir. 2002) (noting that remand "recognizes that the [BIA] is the adjudicative body having primary responsibility and experience in asylum matters"); *Alvarado-Carillo* v. *INS*, 251 F.3d 44, 47 (2d Cir. 2001) ("[M]indful of the deference generally granted to the BIA, we remand to permit the BIA to re-evaluate petitioner's claim in light of this opinion."); *Stewart* v. *INS*, 181 F.3d 587, 595 n.6 (4th Cir. 1999); *Gailius* v. *INS*, 147 F.3d 34, 47 (1st Cir. 1998) (remand "is the appropriate remedy when a reviewing court cannot sustain the agency's decision because it has failed to offer legally sufficient reasons for its decision"); *Rhoa-Zamora* v. *INS*, 971 F.2d 26, 34 (7th Cir. 1992) ("We will not weigh evidence that the [BIA] has not previously considered; an appellate court is not the appropriate forum to engage in fact-finding in the first instance."), cert. denied, 507 U.S. 1050 and 508 U.S. 906 (1993).

3. In this case, moreover, the practical importance of the Ninth Circuit's failure to defer is manifest. The critical factual question framed by the court of appeals is whether evidence of changed country conditions rebuts the presumption that respondent has a well-founded fear of persecution (for asylum) or would be threatened with persecution (for withholding of removal) in Guatemala if he is returned to that country. Although the court of appeals answered that question in the negative because the State Department report concerning country conditions in Guatemala in 1997 identified some continuing violence by guerilla groups (App., *infra*, 11a-12a), the court did not address the State Department's further statement that "[i]n our experience, only [political] party leaders or high-profile activists generally would be vulnerable to such harassment and usually only in their home communities,

making internal relocation a viable alternative in many cases." A.R. 66. A remand would permit the BIA to evaluate the State Department report as a whole and determine in the first instance the extent to which it rebutted a presumption of a fear of, or actual, persecution in the future. A remand also would permit the BIA to consider whether additional relevant evidence should be obtained in order to update information about conditions in Guatemala at the present time, more than five years after the period covered by the State Department report in the record.

The court of appeals thus was grossly mistaken when it declared that the correct disposition of this case was so "clear" that no remand was required. App., *infra*, 11a. That statement ignored the possibility of further administrative fact-finding, and also that the *existing* record evidence was itself equivocal. A remand to the BIA therefore is plainly required in this case. See *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration."). That is all the more so because the rebuttable presumption on which the court of appeals relied is a creature of regulations issued by the Attorney General. The BIA must be given an opportunity to interpret and apply those regulations in the first instance and to determine what sort of evidence is sufficient in this case to overcome the separate versions of the presumption applicable to asylum and withholding claims.

4. As noted above, the petition in *Chen* presents two questions, each involving a legal error that independently warrants reversal of the court of appeals' judgment. If this Court grants review in *Chen* and reverses the Ninth Circuit's judgment on the ground that the

BIA's adverse credibility determination was permissible and that the BIA's finding of no past persecution therefore should have been sustained, the Court might not address the second question in that case—whether the Ninth Circuit, once it set aside the BIA's credibility determination, should then have remanded the case for further administrative proceedings. In this case, the government seeks certiorari only on the question of whether a remand was required. Accordingly, granting review in this case, as well as in *Chen*, would ensure the Court's ability to address the remand issue that is raised in both cases and in numerous other Ninth Circuit cases, regardless of the Court's disposition of the first question in *Chen*. We therefore respectfully suggest that the Court grant the certiorari petition in this case as well as the pending petition in *Chen* and consolidate the cases for oral argument.

In the alternative, the petition in this case should be held pending this Court's final disposition of *Chen*. If the Court reverses the Ninth Circuit's decision on the first issue presented in *Chen* and does not address the remand issue, it should then grant certiorari in this case to consider the remand issue.[4]

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[4] This case arises under the pre-IIRIRA provisions of the INA, whereas *Chen* is governed by IIRIRA's amendments. That is not a significant difference for purposes of this Court's review, however. The common question presented in both cases involves the correct relationship between the BIA and the courts of appeals in asylum cases, and whether and when a court of appeals should reserve judgment on factual questions not yet addressed by the BIA. IIRIRA's amendments are incidental to that common question. Indeed, IIRIRA's specific standards for judicial review of BIA removal orders (see 8 U.S.C. 1252(b)(4)(A) and (B)) reflect the longstanding "substantial evidence" standard of review (see 8 U.S.C. 1105a(a)(4) (1994)) and essentially codify this Court's holding in *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 & n.1, 483-484 (1992).

CONCLUSION

The petition for a writ of certiorari should be granted and the case should be consolidated for oral argument with *INS* v. *Chen*, petition for cert. pending, No. 02-25 (filed July 3, 2002). Alternatively, the petition should be held pending this Court's disposition of the petition in *Chen*, and then should be disposed of as appropriate in light of the final disposition of that case.

Respectfully submitted.

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JULY 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-71004

FREDY ORLANDO VENTURA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

Petition for Review of a Decision of the Board of Immigration Appeals. INS No. A72-688-860

Argued and Submitted June 13, 2001
Filed Sept. 10, 2001

Before: SCHROEDER, Chief Judge, LAY,* and DAVID R. THOMPSON, Circuit Judges.

DAVID R. THOMPSON, Circuit Judge:

The petitioner Fredy Orlando Ventura petitions for review of a Board of Immigration Appeals (BIA) decision dismissing his appeal of the denial of his asylum application. He contends the record compels a finding that he established past persecution on account of imputed political opinion, and the INS's evidence of

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* Honorable Donald Lay, Circuit Judge, Eighth Circuit Court of Appeals, sitting by designation.

changed country conditions failed to rebut the presumption of future persecution. He seeks asylum and withholding of deportation. We grant Ventura's petition for review, and hold that he is entitled to withholding of deportation. We also conclude Ventura is eligible for asylum, and remand his asylum application to the BIA for the Attorney General's exercise of his discretion in granting or denying that application.

I.

Ventura is a 30-year-old native and citizen of Guatemala. He first entered the United States without inspection in July 1993. He left Guatemala after guerrillas spray-painted three "notes" on the wall of his house in 1992 and 1993, demanding that he join their forces and threatening harm to his family if he did not. In his testimony before the Immigration Judge (IJ), Ventura stated that all three notes were the same and that they read, "Fredy Ventura, you must join us, or your family will suffer the consequences." He further testified "if I didn't turn myself in to them, that they would kill me, that they would threaten me."

Ventura testified and stated in his asylum application that because members of his family are in the military, the guerrillas perceive him to be their enemy, and for that reason they have threatened him. Ventura's cousin Oswaldo Ventura is a lieutenant in the army and has served in the military for twelve years. Ventura states that he and Oswaldo grew up together and Oswaldo "is like a brother to me." Oswaldo used to visit Ventura during his monthly leave and would sleep at Ventura's house.

Ventura's uncle Arnoldo Ventura is a Military Commissioner, responsible for recruiting Guatemalan men

to join the army. Approximately five years before Ventura fled Guatemala, Arnoldo was nearly killed by guerrillas, who attacked him with machetes. In addition, another of Ventura's cousins, Lorenzo Ventura, a member of the army, was killed by guerrillas in 1988, while walking in a village and not in uniform. Ventura's friend, Martin Contreras, was murdered by guerrillas after receiving threats similar to those Ventura received, demanding that he join the guerrillas.

Ventura testified that he is not familiar with the guerrillas' ideology, but he stated in his asylum application that he sympathizes with the military and not with the guerrillas. Ventura stated that the guerrillas can find him anywhere in Guatemala, and that if he returned to Guatemala he would be killed, even though a peace accord has been signed.

The IJ found Ventura's testimony to be credible, but determined that Ventura "failed to present adequate objective evidence to show that his fear is based on one of the protected statutory grounds." The IJ found Ventura's case was indistinguishable from *INS v. Elias-Zacarias*, 502 U.S. 478, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992). The IJ also concluded, without elaboration, that, "[i]n view of changing country conditions," Ventura failed to demonstrate a well-founded fear of future persecution.

The BIA conducted a de novo review of the record. In its six-paragraph per curiam order, it briefly discussed and rejected Ventura's "on account of" argument and stated that it agreed with the IJ's decision that Ventura had failed to make the required showing that he was persecuted on account of a statutorily protected ground. The BIA declined to address the

issue of changed country conditions, and dismissed Ventura's appeal.[1] This petition for review followed.

II.

When the BIA conducts its own review of the record, our review is limited to its decision. *Singh v. INS*, 94 F.3d 1353, 1358 (9th Cir. 1996). A factual determination by the BIA must be upheld if it is "supported by reasonable, substantial, and probative evidence on the record considered as a whole." *Elias-Zacarias*, 502 U.S. at 481, 112 S. Ct. 812. That determination "can be reversed only if the evidence presented by [the petitioner] was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." *Id.* (citing *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300, 59 S. Ct. 501, 83 L. Ed. 660 (1939)). The petitioner "must establish that the evidence not only supports the conclusion that [he] suffered persecution or has a well-founded fear of persecution, but compels it." *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc) (citing *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995)).

We will accept as true an applicant's testimony when neither the IJ nor the BIA question the applicant's credibility. *See Kamla Prasad v. INS*, 47 F.3d 336, 339 (9th Cir. 1995). We recognize that corroborating evidence of a persecutor's motive may be difficult or impossible to come by. "[W]e have repeatedly emphasized that 'asylum applicants are not required to produce documentary evidence' to support their claims

[1] Apparently, because Ventura's brief was untimely filed, the BIA did not consider it in reaching its decision. *In re Fredy Orlando Ventura*, A72 688 860 (Board of Immigration Appeals Feb. 24, 1999) (interim order).

of persecution. We have also emphasized that '[b]ecause asylum cases are inherently difficult to prove, an applicant may establish his case through his [or her] own testimony alone.'" *Shoafera v. INS*, 228 F.3d 1070, 1075 (9th Cir. 2000) (citations omitted).

A determination of past persecution such that a petitioner's life or freedom was threatened creates a presumption of entitlement to withholding of deportation. *Duarte de Guinac v. INS*, 179 F.3d 1156, 1164 (9th Cir. 1999). The INS may rebut that presumption by showing by a preponderance of the evidence that persecution is no longer more likely than not due to changed country conditions. *Id.*

III.

Neither the BIA, the IJ, nor the parties addressed the question of whether the threats to Ventura rose to the level of past persecution. However, it is clear from the record that they did.

Death threats and forced recruitment efforts by a revolutionary group constitute persecution. *See Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998); *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997); *see also Arteaga v. INS*, 836 F.2d 1227, 1232 (9th Cir. 1988) ("Forced recruitment by a revolutionary army is tantamount to kidnapping, and is therefore persecution.").

Past persecution was established on facts similar to those in the present case in *Del Carmen Molina v. INS*, 170 F.3d 1247 (9th Cir. 1999). There, the petitioner received two notes from El Salvadoran guerrillas threatening her family if she did not go with them and talk to them about her cousins. She opposed the guerrillas, her family was involved in the military, and

some relatives had been killed because of the family's military ties.

Consistent with *Del Carmen Molina*, we conclude that the threats and forced recruitment directed toward Ventura rise to the level of past persecution. We turn next to the primary issue in this case, whether Ventura established that he was persecuted on account of an imputed political opinion. To establish this, he had to "show that his persecutors actually imputed a political opinion to him." *Sangha*, 103 F.3d at 1489.

Past political persecution of family members provides evidence of imputed political opinion of an asylum applicant. *Id.; see also Ramirez Rivas v. INS*, 899 F.2d 864, 868-71 (9th Cir. 1990). In such cases, "the trier of fact must examine how close a relationship exists between the persecution of family members and the situation of the applicant." *Sangha*, 103 F.3d at 1489 (citing *Arriaga-Barrientos v. U.S. INS*, 937 F.2d 411, 414 (9th Cir. 1991)). Forced recruitment without evidence of a discriminatory purpose is insufficient to compel a finding of persecution on account of political opinion. *Pedro-Mateo v. INS*, 224 F.3d 1147, 1151 (9th Cir. 2000) (citing *Elias-Zacarias*, 502 U.S. at 482-83, 112 S. Ct. 812).

Ventura's evidence that his persecution occurred on account of imputed political opinion consists of his credible, uncontradicted testimony that the guerrillas targeted him because they believed he held anti-guerrilla sympathies; that his uncle was attacked and his cousin was killed by guerrillas because of their military affiliations; and that he is closely associated with his cousin Oswaldo, an army lieutenant.

In *Del Carmen Molina*, we held the petitioner established a well-founded fear of persecution on account of political opinion. Although notes directed to her by the guerillas gave no explicit indication that the guerillas were motivated by her political opinion, the notes stated that the guerillas wanted to talk to her about her cousins, and to take her with them. 170 F.3d at 1249. The petitioner's credible and uncontradicted testimony was that the guerillas threatened her because of her political opinion. *Id.* at 1250. Relying on this evidence, we concluded that the BIA's determination that the petitioner was not persecuted on account of actual or imputed political opinion was "not supported by reasonable, substantial, and probative evidence." *Id.*

The INS attempts to distinguish *Del Carmen Molina*, arguing that there the petitioner had an identifiable political opinion and her testimony constituted sufficiently compelling evidence to require reversal. Those circumstances, however, are also present in this case. Like the petitioner in *Del Carmen Molina*, Ventura presented credible, uncontradicted testimony that the guerrillas threatened him on account of his imputed anti-guerrilla beliefs. In addition, like the *Del Carmen Molina* petitioner, Ventura testified that he and his family are closely associated with the military, that family members have been targeted because of that affiliation, and that he himself can be readily associated with pro-military, anti-guerrillas views. In addition, the record establishes that Ventura, like Del Carmen Molina, had an identifiable political opinion—anti-guerrilla sympathy for the military.

We conclude the evidence presented by Ventura compels a finding that he was persecuted on account of imputed political opinion. This conclusion is supported

not only by *Del Carmen Molina*, but also by our decision in *Shoafera*, 228 F.3d at 1074-75. There, an Ethiopian woman claimed she was raped on account of her Amharic ethnicity. Evidence of her persecutor's motives consisted solely of her and her sister's credible, uncontradicted testimony that she was raped because she was Amharic. *Id.* We held:

> "[N]either the IJ nor the INS elicited any testimony from Shoafera demonstrating that the nature or basis for her testimony was questionable. A bald assertion that Shoafera's credible testimony was 'speculation' is insufficient. Some evidence or support for that conclusion must be offered. . . . Shoafera's uncontroverted and credible testimony is sufficient to establish that she was persecuted on account of ethnicity."

Id. at 1075.

The INS argues the present case is more similar to *Elias-Zacarias* than to either *Del Carmen Molina* or *Shoafera*, and in any event, *Elias-Zacarias*, a Supreme Court decision, is controlling. In *Elias-Zacarias*, Guatemalan guerrillas attempted to recruit the petitioner, but he refused "because the guerrillas [were] against the government and he was afraid that the government would retaliate against him and his family if he did join the guerrillas." *Elias-Zacarias*, 502 U.S. at 480, 112 S. Ct. 812. The Court held that a threat of forced recruitment does not alone constitute persecution on the basis of political opinion. *Id.* at 482-83, 112 S. Ct. 812. The record contained no evidence that the petitioner had an actual or imputed political motive to resist recruitment. *Id.* at 482, 112 S. Ct. 812. The petitioner did not testify that he believed the guerrillas imputed any political

opinion to him, that any family members had been persecuted in the past by guerrillas, or that he had any anti-guerrillas ties. Ventura's circumstances are far different from those of the petitioner in *Elias-Zacarias*.

Ventura's circumstances are also distinguishable from those of the petitioner in *Ochave v. INS*, 254 F.3d 859 (9th Cir. 2001). There, the petitioner declared in her asylum application that she was raped by guerrillas on account of her imputed political opinion because her father was a government official. *See id.* at 862. The IJ found the petitioner's statements credible. *Id.* at 869-70 (Pregerson, J., dissenting). In denying review of her petition, we emphasized that the IJ was not compelled to accept the accuracy of her belief regarding her persecutors' motives because there was "substantial evidence tending in the other direction." *Id.* at 866. There had been many similar attacks on other victims, suggesting that the rape of the petitioner may have been a random act of violence; the attack occurred outdoors, rather than at the petitioner's home or workplace (which would have suggested the rapists were seeking the petitioner specifically); and there was no evidence that the rapists knew who the petitioner was. *Id.* at 865-66. In contrast, Ventura presented overwhelming evidence that his persecutors knew exactly who he was: the guerrillas came to his home and painted notes on the wall of his house three separate times, addressing the notes to him personally. No evidence in the record contradicts Ventura's credible testimony that the persecutors targeted him because they believed he held anti-guerrilla beliefs.

Ventura's circumstances are also different from the petitioner's in *Molina-Morales v. INS*, 237 F.3d 1048

(9th Cir. 2001). In *Molina-Morales*, the petitioner's aunt was raped by a local leader of the ARENA party in El Salvador, but there was no evidence the attack was politically motivated. *See id.* at 1050. Nor was there any evidence that the petitioner had any ties to an opposing political party, or that the persecutors had any reason to believe the petitioner opposed their views. We held that the petitioner had not established persecution on account of actual or imputed political opinion. *Id.* at 1051-52.

In *Arriaga-Barrientos v. INS*, 937 F.2d 411 (9th Cir. 1991), the petitioner testified that his release from the Guatemalan military "might be construed [by pro-government forces] as an act sympathetic to the opposition," and that "his long-standing military service might be construed as an expression of political support for the government." *Id.* at 412. Two of his brothers, who lived eight hundred kilometers away, had previously been abducted by unknown gunmen for unknown reasons. *Id.* Unlike the present case, however, those facts failed to demonstrate any reason for the persecutors to impute a political opinion to the petitioner. We held the petitioner had failed to establish a well-founded fear of future persecution on account of political opinion. *Id.* at 413-15.

In contrast to *Ochave*, *Molina-Morales*, and *Arriaga-Barrientos*, Ventura's level of past persecution and his credible, uncontradicted testimony regarding his persecutors' motives compel the conclusion that he was persecuted on account of imputed political opinion.

Because Ventura established past persecution on account of imputed political opinion, he is presumed to have a well-founded fear of future persecution on account of that protected ground. 65 Fed. Reg. 76,121,

76,133 (Dec. 6, 2000) (to be codified at 8 C.F.R. § 208.13(b)(1)). The INS presented evidence of changed country conditions to rebut this presumption, but the BIA did not address that issue. It failed to consider the issue because it determined Ventura had not met his burden of establishing that he was persecuted on account of an imputed political opinion.

When the BIA does not reach the issue of whether changed country conditions rebutted the presumption of a well-founded fear of future persecution, we generally will remand to the BIA for it to consider the issue. We do not remand, however, when it is clear that we would be compelled to reverse the BIA's decision if the BIA decided the matter against the applicant. *Navas v. INS*, 217 F.3d 646, 662 (9th Cir. 2000); *see also Gafoor v. INS*, 231 F.3d 645, 656 n.6 (9th Cir. 2000). We conclude that remand in this case is inappropriate because the INS's evidence of changed country conditions clearly demonstrates that the presumption of a well-founded fear of future persecution was not rebutted.

In December 1996, after Ventura left Guatemala, a peace agreement was signed between the government of Guatemala and the Guatemalan National Revolutionary Party (URNG) (the umbrella guerrilla organization alliance). Bureau of Democracy, Human Rights and Labor, United States Department of State, Guatemala —Profile of Asylum Claims & Country Conditions 2 (June 1997). In March 1997, the URNG "dissolved itself to devote its efforts to legal political activity." *Id.* As a result, "there was marked improvement in the human rights situation." *Id.* at 3. However, "[e]ven after the March cease-fire, guerrillas continue to employ death threats . . . ." *Id.* The 1997 State Department report also states that "the guerrillas [have] renounced the use

of force to achieve political goals. Although the level of crime and violence now seems to be higher than in the recent past, the underlying motivation in most asylum cases now appears to stem from common crime and/or personal vengeance." *Id.* at 4. "[T]he situation is unlikely to improve significantly in the short-term . . . ." *Id.* Thus, the record shows that although violence stemming from persecution by guerillas has declined since Ventura left Guatemala, guerrillas continue to subject civilians to death threats.

In these circumstances, we cannot say the risk to Ventura of future persecution on account of an imputed political opinion has been so minimized as to rebut the presumption of such persecution. *See Cordon-Garcia v. INS*, 204 F.3d 985, 990 (9th Cir. 2000) ("A well-founded fear may be based on no more than a ten percent chance of actual persecution.") (citing *Velarde v. INS*, 140 F.3d 1305, 1310 (9th Cir. 1998)). Ventura's case is similar to *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (en banc), in which we determined that the petitioner's well-founded fear of future persecution by rebels was not rebutted by general evidence of lessened violence in the home country.

In *Borja*, a State Department report stated that the numbers and geographical presence of rebels were declining, the rebels "in most instances" were not interested in the political opinions of their victims, it was "*generally* . . . possible to seek internal resettlement," there were "fewer" disappearances and politically related killings, and peace talks were "adjourned indefinitely" due to "dissension." *Id.* at 738. These factors were not sufficient to rebut the presumption of a well-founded fear of future persecution because "although the current tide of violence may be receding, based on

this record it still exists." *Id; cf. Marcu v. INS*, 147 F.3d 1078, 1081-82 (9th Cir. 1998) (upholding a BIA determination that the presumption was rebutted where (1) a State Department report stated that "current conditions have so altered as to remove any presumption that past mistreatment . . . will lead to mistreatment in the future," and (2) a State Department letter analyzing the petitioner's claim refuted his contention that no real change had taken place and that he would be subjected to retribution if he returned).

We conclude Ventura is eligible for asylum. He is also entitled to withholding of deportation, because the evidence compels the conclusion that it is more likely than not that his life or freedom would be threatened on account of imputed political opinion if he were to return to Guatemala. *See INS v. Stevic*, 467 U.S. 407, 413, 430, 104 S. Ct. 2489, 81 L. Ed. 2d 321 (1984); *Molina-Morales*, 237 F.3d at 1051; *Singh-Kaur v. INS*, 183 F.3d 1147, 1149 (9th Cir. 1999); *see also De Valle v. INS*, 901 F.2d 787, 790 (9th Cir. 1990) (a "clear probability" of future persecution means "more likely than not.").

PETITION FOR REVIEW GRANTED; APPLICATION FOR WITHHOLDING OF DEPORTATION GRANTED; APPLICATION FOR ASYLUM REMANDED for the exercise of the Attorney General's discretion.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

FILE No. A72 688 860 – SAN FRANCISCO

IN THE MATTER OF
FREDY ORLANDO VENTURA

[Date: July 19, 1999]

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Jan Austerlitz, Esquire
405 14th Street, #1600
Oakland, California 94612

ON BEHALF OF SERVICE:

Dennise D. Willett
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] – Entered without inspection

APPLICATION: Asylum; withholding of deportation; voluntary departure

ORDER

PER CURIAM. The respondent's appeal is dismissed. The Immigration and Naturalization Service's motion for summary dismissal is denied. We find that summary dismissal of this case is not appropriate under the circumstances presented.

On appeal, the respondent argues in his Notice of Appeal that: "The IJ abused her discretion in denying asylum based on changed country conditions when there was evidence to support the fact that conditions have not changed. She also erred in finding that the threats against me by the guerillas were not politically motivated."

We agree with Immigration Judge that the respondent has not satisfactorily met his burden of establishing that he faces persecution "on account of" a qualifying ground. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (setting forth the "on account of" standard for asylum"); *Matter of R-O-*, 20 I&N Dec. 455 (BIA 1992). The respondent speculated that the guerrillas were after him because of his contact with the army (Tr. at 11). However, this speculation is entitled to little evidentiary weight because it is merely the respondent's opinion. He did not testify that the guerillas told him or anyone else the reasons for wanting him. *INS v. Elias-Zacarias, supra*, at 483 (respondent must provide some evidence of persecutor's motive).

As we find the respondent did not meet his burden of establishing that he faces persecution "on account of" a qualifying ground, we need not address his argument regarding changed country conditions.

Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the Immigration Judge's order.

/s/ JOHN GWENDELSBERG
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

FILE No. A72 688 860 – SAN FRANCISCO

IN THE MATTER OF
FREDY ORLANDO VENTURA, RESPONDENT

[Feb. 10, 1998]

IN DEPORTATION PROCEEDINGS

CHARGE: Entry without inspection

APPLICATION: Asylum; withholding of deportation; voluntary departure

ON BEHALF OF RESPONDENT: Alice Hall, Esq.

ON BEHALF OF SERVICE: Denise Willett, Esq.

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a 20-year-old, single man, native and citizen of Guatemala. At a hearing before this Court on October 29th 1996, Counsel on Respondent's behalf, admitted the factual allegations contained in the Order to Show Cause dated August 15, 1995, and conceded deportability has been established by clear, convincing, and unequivocal evidence. Respondent declined to designate a country of deportation. The Court desig-

nated Guatemala. In lieu of deportation, Respondent has applied for asylum and withholding of deportation or in the alternative voluntary departure.

In order to qualify for withholding of deportation to a particular country, an applicant must demonstrate that his life or freedom would be threatened there on account of race, religion, nationality, membership in a particular social group, or political opinion. Section 242(h) of the Immigration and Nationality Act. The Supreme Court has held that this requires an applicant to meet the clear probability standard, i.e. to show that persecution is more likely that not to occur. *INS* v. *Stevic*, 467 U.S. 407 (1984).

An applicant for asylum must demonstrate that he is unwilling to return to his homeland because of persecution or a well-founded fear of persecution by the government or a group that the government cannot control based on the above enumerated grounds. Section 208 of the Immigration and Nationality Act. The Supreme Court has held that an applicant for asylum must demonstrate an[] actual and genuinely held subjective fear of persecution and further show that that fear is objectively reasonable, i.e. well founded. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

However, past persecution or a well-founded fear of future persecution standing alone is insufficient to establish eligibility for asylum. The statute requires that such harm be on account of one of the specific grounds enumerated in the Act, i.e. a nexus to a protected ground must be shown. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). A generalized political agenda on the part of the persecutor is not enough to establish persecution on account of political opinion. *Zacarias, supra.*

An asylum applicant's testimony is extremely important since an individual [*sic*] applying for asylum relief are often initially limited in the additional evidence that they can obtain to prove past or future persecution. *Plateros-Cortez v. INS*, 804 F.2d 1127 (9th Cir. 1986). An alien's own testimony without corroborative evidence may be sufficient to prove a well-founded fear of persecution where that testimony is believable[,] consistent and sufficiently detailed to provide a plausible and coherent account of the basis for the fear. *Matter of Mogharrabi*, 19 I&N Decs. 439 (BIA 1987).

Finally, even if statutorily eligible for relief, an asylum applicant must demonstrate that he merits a favorable exercise of discretion.

In arriving at my decision today, I very carefully observed Respondent's demeanor while he was on the witness stand. He testified in a candid and forthright fashion without hesitation. His testimony was sincere. His testimony was consistent with his application for relief. This Court paid particular attention to Respondent's testimony in view of the reason for the denial of the affirmative application for asylum in which the asylum officer found respondent not to be credible. This Court strongly disagrees with that finding. The inconsistencies cited by the asylum officer appear to be inconsistencies which can be attributed to miscommunication in translations and/or respondent's nervousness. He apparently corrected himself quickly when he misspoke at his asylum interview. Today, the story he presented was substantially the same in all material respects with the corrected version of the facts in his case which he presented to the asylum officer. In view of his nervousness today, I find it clear that Respondent testified credibly both before this court and I believe it

is likely that he testified credibly before the asylum officer as well and that any inconsistencies were simply attributed to his nervousness and lack of clarity with regard to the interpretation. For these reasons, I find that Respondent has testified credibly and we will afford his testimony as full weight as evidence.

Based upon respondent's testimony the following are this court's findings of fact. Respondent was born and raised in El Barro, Conguaco, Guatemala. He lived there all his life until he came to the United States in July of 1993. His family had many connections to the military. He had an uncle and cousins who were affiliated with the army. Respondent himself began to have problems himself in March of 1992 when the guerillas wrote on his home that he should join them. The incident frightened him but he felt there was nothing that could be done. Two months later, it was again written on his house that Respondent should join the guerillas or his family would suffer the consequences. This time he went to the police, but they also told Respondent that there was nothing that could be done. Respondent was concerned and he discussed the situation with friends and neighbors and he began thinking about leaving Guatemala and coming to the United States. In June of 1993, when the guerillas again wrote on his house that Respondent must join them or his family would suffer the consequences, he feared that they would, in fact, harm him and they decided to come to the United States.

Respondent testified that he didn't want to join the guerillas because all his family are allied with the army. He is very close to one cousin, who is a lieutenant in the army and has he has been serving in the army for close to twelve years. They are close and see each other

frequently. Respondent's uncle, Arnaldo Ventura, is a military commissioner in the local area and has held this job for many, many years. He was attacked by people with machetes in 1987 and the family strongly believes it was the guerillas who w[ere] responsible. Another cousin of Respondent's who was a soldier was killed in 1988 when he and his brother were shot at and one of the two, the soldier, was killed.

Respondent was particularly frightened by the death of his friend and neighbor, Martin Contreras. He and Martin ha[d] discussed the fact that the guerillas had made attempts to recruit them. Martin had told respondent about that and asked for his advice. Respondent had told Martin his belief that neither of them could do anything about that. After regularly receiving notes like the one Respondent received, Martin was murdered in the countryside in February of 1993. A note was left by his body indicating that the reason for his death was that he did not obey. This incident prompted Respondent to make arrangements to leave Guatemala which he did in July of 1993.

Respondent testified that he was not familiar with the guerrilla ideology, that he feels certain that part of their belief encompasses the belief that if one is not with them, one is against them. Respondent did not relocate within the country of Guatemala because he believes that the guerrillas could find him anywhere in the country. He fears that if he were to return to Guatemala at the present time that the guerrillas would kill him because they do not rest until they finish with everyone.

Respondent believes that they would carry out their threats against him despite the fact that the peace

accords have been signed and for this reason Respondent fears returning to Guatemala.

Based an his credible testimony Respondent has clearly demonstrated a subjective fear of persecution. I find, however, he has failed to demonstrate statutory eligibility for asylum because he has failed to present adequate objective evidence to show that his fear is based on one of the protected statutory grounds. Respondent has failed to present objective evidence to demonstrate that the guerillas['] interest in him was on account of his political opinion or a characteristic which they sought to overcome or persecute him for. Basically, I find that Respondent has failed to distinguish his situation from the similar situation presented in the case of *Elias-Zacarias*, which in essence held that forcible recruitment does not fall within a protected statutory ground. I find, further, the Respondent has failed to present subjective evidence to demonstrate that even if the guerillas, in fact, had an interest in him in the past, that they would continue to have motivation and inclination to persecute him in the future. In view of changing country conditions, I find that Respondent has failed to demonstrate by objective evidence that his subjective fears are well-founded in that regard as well.

For these reasons, I find that Respondent has failed to demonstrate statutory eligibility for asylum. It follows, therefore, that he has failed to meet the heavier burden applicable to withholding of deportation.

In the alternative, Respondent has requested the privilege of voluntary departure. I believe he has demonstrated statutory eligibility for that relief and that he is deserving in the exercise of discretion. Accordingly, I enter the following order:

ORDER

IT IS ORDERED that Respondent's request for asylum be denied.

IT IS FURTHER ORDERED that Respondent's request for withholding of deportation be denied.

IT IS FURTHER ORDERED that Respondent be granted the privilege of voluntary departure without expense to the Government, on or before June 10th 1998, or any extension beyond such date as the District Director shall authorize.

IT IS FURTHERED ORDERED that if Respondent should fail to depart when and as required, the privilege of voluntary departure shall be withdraw[n] without further notice or proceedings, the following order shall thereupor become immediately effective:

Respondent shall be deported from the United States to Guatemala on the charges contained in the Order to Show Cause.

/s/ DANA MARKS KEENER
DANA MARKS KEENER
Immigration Judge

APPROVED AS TO CONTENT ONLY
Dated: 5/26/98

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99-71004
I&NS No. A72-688-860

FREDY ORLANDO VENTURA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

Feb. 4, 2002

Before: SCHROEDER, Chief Judge, LAY*, and THOMPSON, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the respondent, INS's petition for hearing. Judge Schroeder has also voted to deny its petition for rehearing by the court en banc, and Judges Lay and Thompson have recommended that petition be denied.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested en banc rehearing. See Fed. R. App. P. 35(b).

The petitions for panel rehearing and for rehearing by the court en banc are DENIED.

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* Honorable Donald Lay, Circuit Judge, Eighth Circuit Court of Appeals, sitting by designation.

No. 02-29

Supreme Court, U.S.
FILED
AUG 2 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

—v.—

FREDY ORLANDO VENTURA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent Fredy Orlando Ventura, through counsel, hereby opposes the Immigration and Naturalization Service's ("INS") petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit, far from engaging in a "recurring error" or creating a split with other circuits, did no more than apply well-settled principles of administrative law —principles that this Court, the Ninth Circuit, and other courts of appeals routinely apply—in determining that remand to the Board of Immigration Appeals ("BIA") on the issue of changed country conditions would be a futile and wasteful exercise. The court reached that conclusion because the administrative record lent itself to only one reasonable outcome—a finding that INS had not carried its burden of rebutting the presumption of a well-founded fear of future persecution with specific evidence of changed country conditions. Based on that specific record, the court reasonably concluded that remand to the BIA was unwarranted.

That ruling applied the correct legal standard and is consistent with this Court's jurisprudence and with rulings by other courts of appeals. The Ninth Circuit, like other circuits and like this Court, applies the traditional principle of administrative law that where an administrative agency has not passed on a particular issue, a federal court presumptively should defer (whether by remand or other means) and allow the administrative agency an opportunity to pass on the issue in the first instance, subject to judicial review under the appropriate standard of review. This principle has been variously termed "separation of powers," "primary jurisdiction," and "exhaustion of remedies."

Moreover, like other courts of appeals, the Ninth Circuit's presumption of deference for initial consideration by the administrative agency is exactly that—a presumption—and not an absolute and rigid rule. Like most presumptions, the presumption is rebuttable and does not compel deference where, on balance, deference would be an empty exercise and a waste of judicial and litigant resources. Where it is clear that the agency could come to only one sustainable conclusion, the Ninth Circuit, like other courts, has declined to engage in the empty ritual of allowing the agency the "first crack" at the issue and has instead decided the issue itself. There is nothing extraordinary or erroneous about such a common-sense balancing of the benefits of deferring to an administrative agency against the costs of doing so.

Because the Ninth Circuit, in this case, was applying the same flexible doctrine of administrative law that other courts of appeals and this Court have applied in analyzing the rebuttable presumption of deference, no circuit split exists. Indeed, in situations essentially identical to the present case, the Ninth Circuit has granted asylumseekers' petitions for review, held that asylumseekers were presumptively entitled to asylum, and then *remanded* to the BIA for an initial assessment of changed country conditions—in other words, precisely the result for which INS is advocating.

Thus, the Ninth Circuit applies the correct principle of administrative law to asylum cases and often finds that remand is appropriate. In substance, then, INS's disagreement with the Ninth Circuit's ruling in this particular case is not that the court applied the wrong legal principle or that the court is out of step with its sister circuits, but rather that INS is not in agreement with the application of the undisputed legal principle to the facts of this specific case and this specific administrative record. INS prefers that the panel in this case would

have reached the same conclusion that other Ninth Circuit panels have reached in similar asylum cases, namely, that remand to the BIA was appropriate. Yet, disagreement with one panel decision's application of an undisputed legal principle to a particular factual pattern is not worthy of this Court's scarce certiorari jurisdiction, and the Court thus should deny the petition.

STATEMENT

Respondent fled Guatemala in 1993 after receiving several threats from the Guatemalan guerrillas that he join them or be killed. Respondent feared the guerrillas in light of his family's close association with the Guatemalan military and past violence by the guerrillas against his family and a friend. App. at 20a-21a.[1]

Respondent's affiliation with the military is not tangential in nature. Respondent had a close relationship with his cousin, who was a lieutenant in the Guatemalan army. Respondent described their relationship as akin to brothers. Respondent's cousin would visit Respondent's home during his monthly leave from the military and would sleep there. In addition, Respondent's uncle was a military commissioner for many years. As a military commissioner, he was responsible for recruiting young Guatemalan men to join the army. Respondent's uncle was attacked by the guerrillas with a machete and almost killed. Another of Respondent's cousins was also in the military and was killed by the guerrillas. *Id.*; A.R. at 77.

In 1992 and 1993, shortly before his flight from Guatemala, Respondent received three written threats from the guerrillas. Each threat indicated that Respondent and/or his family would be harmed if Respondent

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[1] Cites to "App." are to the appendix to the petition for certiorari. Cites to "Opp. App." are to the appendix to this opposition.

did not join the guerrillas. Respondent believed that he had been targeted because of his family's military affiliation and because the guerrillas were well aware of Respondent's close relationship with the military members of his family. In 1993, the guerrillas targeted one of Respondent's close friends. After receiving several threats, the friend was shot and killed. Next to the friend's body was a note that stated "because you didn't obey." App. at 20a-21a; A.R. at 71-79.

After receiving the guerrillas' third threat and after his friend's murder, Respondent fled Guatemala, made his way to the United States, and affirmatively sought asylum. App. at 20a-21a; A.R. at 71.

As described in Petitioner's Statement, the Immigration Judge denied Respondent's asylum request, and the Board of Immigration Appeals ("BIA") affirmed. App. at 14a-23a. The BIA concluded that Respondent had not established a causal link between his imputed political view (i.e., sympathy for the military) and the threats. The BIA thus held that Respondent had not established his presumptive eligibility for asylum. Because of that determination, the BIA did not reach the issue of whether conditions in Guatemala had changed sufficiently to rebut any presumption that Respondent had a well-founded fear of future persecution. The primary evidence in the record relating to country conditions consisted of a 1997 State Department country report that indicated that, although the situation in Guatemala was improving, guerrilla violence still existed. A.R. at 87-98.

After the BIA decided in INS's favor, Respondent petitioned the Ninth Circuit for review. *See Ventura v. INS*, 264 F.3d 1150 (9th Cir. 2001); App. at 1a-13a. The Ninth Circuit reversed the BIA's determination and held that Respondent had established his presumptive eligibility for asylum and his eligibility for withholding of deportation. App. at 10a-13a. The court noted that the BIA had not reached the issue of country conditions in Guatemala and that, in such a circumstance, "we generally will remand to the BIA for it to consider the issue." App. at 11a. The court went on to state that "[w]e do not remand, however, when it is clear that we would be compelled to reverse the BIA's decision if the BIA decided the matter against the applicant." *Id.* The court concluded that, based on the administrative record before it, the latter rule applied and avoided the need for a remand. App. at 11a-13a.

While Respondent's asylum case was working its way through the administrative and judicial process, Respondent filed a motion with the BIA to reopen his asylum case to introduce new evidence impacting his claim.[2] Opp. App. at 1a-21a. After Respondent's flight from Guatemala and after his hearing before the Immigration Judge, his family was repeatedly targeted with threats and violence. First, two of Respondent's brothers were brutally murdered in Respondent's hometown. Second, shots were fired at Respondent's parents' home, and his parents received a note stating "We already started with your family and we will finish with you if you don't leave this place." His family fled as a result. After their flight, shots have continued to be fired at their home. *Id.*

The BIA denied the motion to reopen, Opp. App. at 18a-21a, and Respondent sought review in the Ninth Cir-

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[2] Attached as an appendix to this opposition is Respondent's motion to recall the mandate in Ninth Circuit case number 99-71004. That motion describes the procedural history of Respondent's motion to reopen and describes the new evidence supporting Respondent's claim. Respondent is not attaching the exhibits to the motion, given that they are somewhat voluminous. Respondent requests that the Court take judicial notice of the file in Ninth Circuit case number 99-71004. Respondent will provide additional materials about that related case upon request.

cuit (case no. 99-71004). Respondent's former counsel, however, failed to pay a required filing fee, and the Ninth Circuit dismissed the appeal for failure to prosecute. Upon substitution of new counsel, Respondent moved to recall the Ninth Circuit's mandate and to reinstate his petition for review relating to the new evidence. Opp. App. at 1a-17a. The Ninth Circuit, however, did not rule on the motion and instead granted Respondent's petition for review based solely on the original record. The motion to recall the mandate is still pending before the Ninth Circuit.

REASONS FOR DENYING THE PETITION

This Court long ago crafted the relevant legal principle governing the issue of when a court should defer to an administrative agency for initial determination of an issue and when the court need not defer. The Court created a presumption of deference that can be rebutted by balancing the benefits and costs of deference—in other words, by determining if deference to the agency for initial consideration of an issue is really worth it. The Ninth Circuit and other circuits have applied that well-settled rule on many occasions and, depending on the facts before them, have at times deferred and at times not deferred. The panel decision in this case applied the same exact principle and, based on the facts before it, concluded that remand would not be appropriate in light of the administrative record in this case. That application of law to fact by one panel does not warrant a grant of certiorari.

The Court's Creation Of The Rebuttable Presumption Of Initial Agency Determination Of Issues Within An Agency's Jurisdiction

The Court has held that, as a general matter, administrative agencies, and not courts, should have the first opportunity to pass on issues relating to the laws and regulations that are within the agencies' ambit of responsibility. Once an agency has addressed the issue, a federal court may review the agency's decision under the appropriate standard of review. Whether referred to as "primary jurisdiction," "exhaustion of remedies," or "separation of powers," the doctrine is "concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956); *see Reiter v. Cooper*, 507 U.S. 258, 269 (1993) (distinguishing between primary jurisdiction and exhaustion of remedies).

"No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *W. Pac. R.R. Co.*, 352 U.S. at 64. Consistent with that principle of flexibility in the relationship between judiciary and administrative agencies, the Court has held that where a court reviews an agency decision and where the agency did not consider a particular issue that the court believes to be of importance, the presumptive course is to remand to the agency for an initial determination. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). However, the *Lorion* Court did not make that rule of remand an inflexible and invariable one and instead made provision for a rebuttal of the presumption under exceptional circumstances. *See id.* at 744 (indicating that

remand was "generally" necessary but that it could be avoided in "rare circumstances"); *see also Reiter*, 507 U.S. at 269 (noting that initial determination by administrative agency was "ordinarily" the appropriate course); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (noting that remand to agency was "preferred course"); *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) (stating that although remand to administrative agency was generally the appropriate course when a court determined that the agency had committed error, "[t]here doubtless may be situations where . . . remand [is] inappropriate"); *cf. Coit Independence Joint Venture v. Fed. Sav. and Loan Ins. Corp.*, 489 U.S. 561, 579-87 (1989) (holding that exhaustion of remedies was unnecessary where it would cause unreasonable delay).

Accordingly, the general rule, as fashioned by this Court, is that a federal court should permit an administrative agency to have the first opportunity to consider an issue within the agency's jurisdiction and that the Court presumptively should not adjudicate the issue in the first instance. However, at no point has this Court held or even intimated that that rule is an inflexible one. Instead, "the question is . . . whether the purposes [the doctrine] serves will be aided by its application in the particular litigation." *W. Pac. R.R. Co.*, 352 U.S. at 64. In other words, the presumption can be rebutted if the benefits of allowing initial decision by an agency are outweighed by the costs of doing so.

Other Circuits' Application Of The Rebuttable Presumption Of Initial Agency Determination

The lower courts have applied the rule of a presumptive, but not automatic, preference for initial agency determination of issues within agency jurisdiction. As the Fifth Circuit has stated:

> A court considering deferring to an agency's primary jurisdiction must weigh the benefits of obtaining the agency's aid against the need to resolve the litigation expeditiously and may defer only if the benefits of agency review exceed the costs imposed on the parties.

Wagner & Brown v. ANR Pipeline Co., 837 F.2d 199, 201 (5th Cir. 1988); *see also PHC, Inc. v. Pioneer Healthcare*, 75 F.3d 75, 80 (1st Cir. 1996); *Nat'l Communications Ass'n, Inc. v. AT&T Co.*, 46 F.3d 220, 223 (2d Cir. 1995) ("The court must also balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings."); *Gulf State Utils. Co. v. Ala. Power Co.*, 824 F.2d 1465, 1473 ("We have said that a district court in its discretion should invoke primary jurisdiction and defer only if the benefits of obtaining the agency's aid outweigh the need to resolve the litigation expeditiously."), *opinion amended by* 831 F.2d 557 (5th Cir. 1987).

Courts have been particularly sensitive to the delay that may result from permitting an agency to evaluate the issue in the first instance. *See Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 60 (2d Cir. 1994); *United States v. McDonnell Douglas Corp.*, 751 F.2d 220, 224 (8th Cir. 1984) ("A court 'should be reluctant to invoke the doctrine of primary jurisdiction, which often, but not always, results in added expense and delay to the litigants where the nature of the action deems the application of the doctrine inappropriate.' ") (citations and quotations omitted). And, courts have expressed a reluctance to invoke the doctrine where initial agency consideration will not provide meaningful assistance to judicial consideration of the issue. *See, e.g., Am. Auto. Mfrs. Ass'n v. Mass. Dep't of Envtl. Prot.*, 163 F.3d 74, 81 (1st Cir. 1998). Thus, where the issue under consid-

eration is straightforward in nature or the resolution clear, the presumption is rebutted. *See Nat'l Communications Ass'n, Inc.*, 46 F.3d at 223.

Courts' application of the presumption and the rebuttal of the presumption extends to the remand context as well, and courts have not remanded for initial agency proceedings where to do so would be inefficient, unnecessary, or otherwise inappropriate. *See Cent. S.D. Coop. Grazing Dist. v. Sec'y of the U.S. Dept. of Agric.*, 266 F.3d 889, 895 n.8 (8th Cir. 2001); *Sierra Club v. Peterson*, 185 F.3d 349, 369-70 (5th Cir. 1999), *cert. denied sub nom. Texas Comm. on Natural Res. v. Veneman*, 532 U.S. 1051 (2001). As one court has explained in declining to remand to an agency for initial determination of an issue:

> Existence of primary authority or primary jurisdiction of an agency does not, however, require remand if the outcome is sufficiently clear. In 1993 Fed. R. Civ. P. 1, calling on courts to seek the "just, speedy and inexpensive" determination of every action, was amended to provide that all procedural rules should be "administered" as well as "construed" to that end. Remanding for clarification of the administrative decision where the outcome is foregone would add to expense and delay with no benefit to the administration of justice, and thus run counter to this authoritative and recent pronouncement.

Thompson v. Shalala, 868 F. Supp. 621, 624-25 (S.D.N.Y. 1994) (citations omitted).

Accordingly, the Ninth Circuit is not alone in its application of the rule of reason when it assesses whether to remand to an administrative agency. Other circuits, as well, balance the benefits of deference

against the costs of deference and then determine whether the presumption of deference has been rebutted.

The Ninth Circuit's Application Of The Rebuttable Presumption Of Initial Agency Determination

The Ninth Circuit's application of the rule is consistent with the application by other courts. The court has stated that "[t]he purpose of the primary jurisdiction doctrine is . . . to secure a place for administrative power within our legal system . . . ." *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1365 (9th Cir. 1987). In evaluating whether to defer, the Ninth Circuit, like other courts, considers the benefits and costs of deference. *See Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1051 (9th Cir. 2000); *Cal-Almond, Inc. v. Dep't of Agric.*, 67 F.3d 874, 881-82 (9th Cir. 1995), *vacated by*, 521 U.S. 1113 (1997).

The Ninth Circuit also has applied the presumption of deference and remand in the asylum context. The court frequently has encountered the scenario at issue in this petition for certiorari—whether to remand for consideration of changed country conditions after holding that the BIA has erred in finding that the asylumseeker did not experience persecution on account of a relevant view or status. When faced with this issue, the Ninth Circuit has evaluated the administrative record before it and, in light of the principles described above, has made a determination of whether remand would be appropriate.

In a number of those asylum cases, the Ninth Circuit has done precisely what INS is advocating here—it has remanded to the BIA for initial consideration of the country-conditions issue. In *Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000), the court reversed the BIA's determination that the asylumseeker had not been persecuted

on account of her ethnicity. The court then remanded to the BIA for assessment of country conditions and described the Ninth Circuit's approach to the remand determination: "Remand is not necessary in all cases similar to the present one. We remand in the present case because it is unclear whether the country conditions in the record serve to rebut the presumption." *Id.* at 1076 n.5 (citations omitted); *see also Gafoor v. INS*, 231 F.3d 645, 655 (9th Cir. 2000) ("We therefore remand to the BIA to consider whether recent events in Fiji undermine the finding that Gafoor's well-founded fear of persecution is rebutted by changed country conditions."); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1250 (9th Cir. 1999) ("[T]he BIA did not analyze the facts to assess whether the INS had rebutted the presumption by showing the effect of changed country conditions. Therefore, we remand to the BIA to determine whether sufficient evidence of changed country conditions exists to rebut the presumption of a well-founded fear of persecution."); *Singh v. INS*, 94 F.3d 1353, 1361 (9th Cir. 1996) ("Given the record before us and because the BIA never applied the regulatory presumptions, we think it appropriate to remand this case."); *Osorio v. INS*, 99 F.3d 928, 932-33 (9th Cir. 1996).[3]

INS, in its petition for certiorari, is correct in noting that, in some cases, the Ninth Circuit has held that remand for consideration of country conditions is inappropriate because the record is sufficiently clear on the issue that only one resolution of the issue is possible. In

[3] The Ninth Circuit has remanded to the BIA for initial evaluation of country conditions in several unpublished decisions as well. *See Hernandez-Patzon v. INS*, No. 98-70451, 1999 WL 282489, at *2 (9th Cir. Apr. 15, 1999); *Ramos-Calmo v. INS*, No. 98-70176, 1999 WL 459582, at *3-*4 (9th Cir. July 2, 1999); *Avila-Enriquez v. INS*, No. 98-70603, 1999 WL 542883, at *1 (9th Cir. July 26, 1999); *Lina v. INS*, No. 97-70500, 1999 WL 486351, at *1 (9th Cir. July 8, 1999).

that situation, the Ninth Circuit—consistent with the rebuttable presumption of deference—does not remand. Instead, it decides the issue and thereby allows the parties and the judicial system to conserve scarce resources that would be consumed by a pro forma remand.

Contrary to INS's suggestion in its petition for certiorari, the Ninth Circuit's country-conditions remand jurisprudence is not monolithic in refusing to remand. Indeed, the court has remanded to the BIA on numerous occasions. But, whether it chooses to remand or not to remand, the Ninth Circuit has simply applied the well-settled principles of administrative law that are described above. The court has balanced the benefits of remand against the costs of remand and, on a case-by-case basis, has made a determination of where the balance lies. There is nothing erroneous in that state of affairs, and no circuit split exists.

The Panel's Application Of The Rebuttable Presumption To The Facts Of This Case

The panel decision at issue here falls squarely within the general, but rebuttable, rule of deference and remand described above. The court determined that Respondent was presumptively entitled to asylum—INS does not challenge that ruling in its petition for certiorari—and then engaged in an analysis of whether remand to the BIA for assessment of country conditions would be appropriate.

That analysis led the court to conclude that remand was inappropriate in that the administrative record in the case reasonably supported one conclusion only: that country conditions had not changed sufficiently to rebut the presumption of asylum eligibility. The court focused on INS's evidence on this issue—a 1997 State Department report on Guatemala. The report indicated that,

although guerrilla violence in Guatemala had diminished, the guerrillas still targeted civilians. In light of the fact that the evidence in the record did not support a finding that INS had rebutted the presumption of eligibility for asylum, the court held, correctly, that remand was not the appropriate course. In other words, the costs of remand (in delay, in consumption of judicial and litigant resources) outweighed the "benefits" of remand (an empty gesture of deference to the BIA). The court's determination not to engage in that empty and wasteful gesture was in accord with established principles of administrative law.

The Ninth Circuit's determination not to remand makes particular sense in light of the BIA's decision not to reopen Respondent's asylum case to permit introduction of recent evidence of persecution of his family. In its petition for certiorari in *INS v. Chen*, No. 02-25, INS takes the position that a significant benefit of remand for consideration of country conditions is the ability of the BIA to reopen the record to "refresh or supplement" the administrative record for full consideration of country conditions. *See* Petition for Certiorari in *INS v. Chen*, No. 02-25 (filed July 3, 2002) at 24. According to INS: "That reopening of the record would perhaps lead to a different result than the one that the court of appeals would find compelled by the initial, less complete record." *Id.* Here, however, the BIA explicitly decided *not* to reopen the case to permit additional evidence supporting Respondent's claim. Opp. App. at 18a-21a. Given that decision, there is no reason to think that the BIA would reopen the case to augment the administrative record with up-to-date evidence of country conditions. Indeed, it would be highly inequitable to permit the BIA to allow new evidence that is unfavorable to Respondent while barring Respondent from introducing

new evidence that provides significant support for his claim.

* * *

INS no doubt disagrees with the Ninth Circuit's application of law to fact in this case. INS surely can and will articulate reasons why the State Department report did, indeed, provide a factual basis for the BIA to come to a different conclusion than the court. But, that factual dispute is not a basis for certiorari. This Court is not a court of errors. Its certiorari jurisdiction is reserved for significant issues of public concern and for issues whose treatment by the lower courts lacks consistency. Given that the Ninth Circuit has applied an undisputed general principle of administrative law and has often come to the precise conclusion for which INS advocates, INS is asking the Court to grant certiorari to correct a factual error alleged to have occurred in this case and in a few others. That is not a compelling basis for a grant of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 2, 2002

APPENDIX

No. 00-70328
(Related To No. 99-71004,
Which Is Set For Oral Argument On June 13, 2001)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FREDY ORLANDO VENTURA,
INS No. A72-688-860,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

MOTION TO RECALL MANDATE, TO
REINSTATE PETITION FOR REVIEW, AND
TO CONSOLIDATE WITH CASE NO. 99-71004

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I. INTRODUCTION

Petitioner Fredy Orlando Ventura has petitioned for review of the Board of Immigration Appeals' ("BIA") denial of his asylum claim. This Court will hear oral argument on that petition (case number 99-71004) on June 13, 2001. While that petition was pending in this Court, Petitioner moved to reopen his asylum proceeding based on significant new evidence supporting his claim that Guatemalan guerrillas had threatened to kill him on account of his imputed political opinion and affiliation with the Guatemalan military. The BIA denied Petitioner's motion to reopen, and Petitioner filed a timely petition for review in this Court on March 24, 2000.

On February 14, 2001, the Court dismissed the petition for review of the BIA's denial of the motion to reopen, because Petitioner and his then-counsel had not paid the required filing fee. In dismissing the petition, the Court issued its mandate.

Petitioner, who now has new appellate counsel, requests that the Court recall its mandate, reinstate the petition for review (in conjunction with this motion, Petitioner is submitting his filing fee), and consolidate the petition with the petition for review of the denial of Petitioner's asylum claim.[1] The new evidence—the brutal murders of two of Petitioner's brothers, death threats against Petitioner's family, and repeated gunfire directed at Petitioner's family's home—provides substantial support for Petitioner's claim that the guerrillas' threats against him were credible and on account of his family's affiliation with the military. The new evidence is also significant in that these new acts of violence undermine the government's claim that conditions have changed in Guatemala

[1] Counsel for Petitioner informed Respondent Immigration and Naturalization Service of his intent to file this motion. INS has not indicated whether it will oppose the motion.

such that Petitioner does not have a well-founded fear of persecution.

In light of the significance of the new evidence, because the petition for review itself was timely, and because Petitioner's default resulted from his prior attorney's failure to ensure that the filing fee was paid, the Court can and should exercise its discretion to recall its mandate and reinstate the petition so that Petitioner's complete asylum claim can be heard and adjudicated on the merits.

II. BACKGROUND

A full account of Petitioner's asylum claim is contained in the brief in support of his petition for review in case number 99-71004, a true and correct copy of which is attached to this motion as Exhibit A; a true and correct copy of the government's brief in case number 99-71004 is attached to this motion as Exhibit B.[2] Petitioner will not provide a full recitation in this motion of the facts giving rise to his asylum claim. Instead, Petitioner will provide a brief description and will focus on the facts relevant here.

Petitioner is seeking political asylum in the United States based on death threats that he received from the Guatemalan guerrillas on account of his family's affiliation with the Guatemalan military and the political views that the guerrillas therefore imputed to Petitioner. The guerrillas threatened to kill Petitioner if he did not join their rebellion. One of Petitioner's friends was killed for not joining the rebellion. *See* Exhibit A at 7-9.

[2] Petitioner requests, pursuant to Federal Rule of Evidence 201, that the Court take judicial notice of Exhibits A through E, which are all part of the case file in Case No. 99-71004 or the case file for this petition for review. *See United States v. Doss*, 563 F.2d 265, 269 n.2 (6th Cir. 1977) (and cases cited therein).

Petitioner, represented by counsel, sought asylum in the United States. An immigration judge found Petitioner's testimony credible but nevertheless denied his claim based on the court's conclusion that the guerrillas' persecution of Petitioner was not "on account of" his political views or social affiliation. *See* Certified Administrative Record in Case No. 00-70328 ("Record") at 55-62. The Board of Immigration Appeals affirmed that determination, *see* Record at 30-31, and Petitioner sought review in this Court (a true and correct copy of the petition for review *is* attached to this motion as Exhibit C). The briefing in that appeal has been completed, and the matter is set for oral argument on June 13, 2001.

On August 26, 1999, while his petition for review was pending in this Court, Petitioner moved to reopen his asylum claim in the BIA. The basis for the motion was the occurrence, after Petitioner's asylum hearing, of several events that lend support to Petitioner's belief that if he returns to Guatemala, he will be targeted and killed. First, two of Petitioner's brothers (one of whom was in the military) were brutally murdered in Petitioner's home town. Second, shots were fired at Petitioner's parents' home, and Petitioner's parents received a note stating "We already started with your family and we will finish with you if you don't leave this place." Petitioner's family fled their town as a result of the incidents. After their flight, shots have continued to be fired at their home. *See* Record at 7-14, 19-27.

On February 24, 2000, the BIA denied the motion to reopen on the rationale that the new evidence would not have changed the result in the case. *See* Record at 2-3. On March 24, 2000, Petitioner filed a timely petition for review in this Court (a true and correct copy of which is attached to this motion as Exhibit D), and on December 13, 2000, the Court ordered Petitioner to pay the

required filing fee. On February 14, 2001, the Court dismissed the petition for failure to pay the fee, pursuant to Ninth Circuit Local Rule 42-1, and issued its mandate. *See* Exhibit E (a true and correct copy of which is attached to this motion).[3]

On May 10, 2001, Heller Ehrman White & McAuliffe LLP substituted in as counsel for Petitioner in connection with the appeal of the denial of asylum. Simultaneously with this motion, Heller Ehrman is also substituting in as counsel in connection with the dismissed petition for review of the BIA's denial of the motion to reopen. Petitioner has proffered the appropriate filing fee. Moreover, Petitioner is submitting a declaration (Exhibit F attached to this motion) stating that he wished to pursue his petition for review of the BIA's denial of the motion to reopen, that he did not ask his former attorney to refrain from paying the filing fee or otherwise prosecuting the petition, and that he did not consent to his former attorney's actions in failing to prosecute the petition. Petitioner further states in his declaration that he was never informed of the need to pay a filing fee and that had he been made aware of the requirement, he would have paid the fee.

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[3] The clerk's dismissal of the petition was not mandatory. *See Larez v. City of Los Angeles*, 946 F.2d 630, 637 (9th Cir. 1991) (refusing to dismiss appeal for violation of rules relating to briefing); *Walker v. Mathews*, 546 F.2d 814, 818 (9th Cir. 1976) (where appellant filed a timely notice of appeal but failed to prosecute the appeal in a diligent manner, refusing to dismiss for failure to prosecute and stating: "While appellant has not proceeded diligently, the Secretary has not shown any prejudice stemming from the delay. . . . Not every appeal which fails to comply with the time requirements breached by appellant herein must be dismissed.").

III. DISCUSSION

A. To Avoid Injustice And To Permit Adjudication Of Petitioner's Asylum Claim On The Merits, The Court Should Reinstate The Petition For Review.

In adjudicating Petitioner's asylum claim, the Court should have before it all of the relevant evidence and should not reach a decision based on an incomplete record. The new evidence that Petitioner seeks to admit is not inconsequential and, in fact, is quite powerful: Two of Petitioners brothers were murdered in a brutal and execution-like manner, and shortly thereafter, Petitioner's family was targeted by having gunshots fired at its home and by receiving a note stating that the family would be exterminated if it did not flee. The family fled, and its home continues to be assaulted by gunfire. Those facts bolster Petitioner's testimony—testimony that the immigration judge found credible—that he had been targeted by the guerrillas for his and his family's affiliation with the military and that he would be targeted and killed if he returned to Guatemala.

Given the nature of the new evidence, the technical nature of Petitioner's default (failure to pay a filing fee after filing a timely petition for review), and the error of Petitioner's former counsel, the Court should exercise its discretion to reinstate the petition. In *Williams v. Boeing Co.*, 681 F.2d 615 (9th Cir. 1982), the district court granted summary judgment in favor of one defendant and entered partial judgment pursuant to Federal Rule of Civil Procedure 54(b). The plaintiff's counsel filed a timely notice of appeal and then successfully moved to dismiss the appeal on the mistaken belief that the district court had not entered an appealable judgment. *See id.* at 616. Upon

realizing his error, counsel moved to reinstate the appeal. This Court permitted reinstatement:

> [T]o deny reinstatement of this appeal would be to preclude the possibility of any appellate review. We do not condone the lack of understanding of appellate procedure demonstrated by appellant's counsel, but we see no reason to let counsel's failings in this case work to his client's detriment.

Id.

The rationale for the *Williams* decision is that appeals should be decided on their merits and that appellants should not be punished for defaults caused by their counsel. That same rationale applies here, and, like *Williams*, reinstatement of the petition for review is appropriate.[4]

B. In Order To Reinstate The Petition, The Court Should Recall Its Mandate.

Because the Court has issued its mandate, recall of the mandate is the appropriate procedural mechanism for reinstating the petition for review. The Court's power to recall its mandate "may be exercised for good cause and to prevent justice. . . ." *Aerojet-General Corp. v.*

---

[4] As noted, Petitioner did not know of the filing fee requirement, and had he known he would have made sure that the fee was paid. *See* Exhibit F. Because Petitioner relied on his former attorney to file the fee and to prosecute the appeal generally (as any reasonable client would do and particularly one that speaks little English), because Petitioner now has new counsel that is able and willing to prosecute the appeal and to comply with applicable requirements, and because Petitioner is proffering the filing fee with this motion, extraordinary and compelling circumstances exist that allow reinstatement of the appeal. *See* Ninth Circuit General Order 2.4. That conclusion is particularly sound in light of the nature of the new evidence that will be excluded if the appeal is not reinstated—extreme violence directed at Petitioner's family that provides support to his claim that he will be targeted *and* killed if he returns to Guatemala.

American Arbitration Assoc., 478 F.2d 248, 254 (9th Cir. 1973) (citation and quotations omitted); *see Watson v. Estelle*, 886 F.2d 1093, 1093 (9th Cir. 1989) ("We recalled the mandate from our judgment . . . pursuant to our power to prevent injustice and to protect the integrity of our processes."); *Verrilli v. City of Concord*, 557 F.2d 664, 665 (9th Cir. 1977) (recalling mandate "[b]ecause of an overpowering sense of fairness and a firm belief that this is the exceptional case requiring recall of the mandate in order to prevent an injustice"); *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988).

In United States v. Mattarolo, 209 F.3d 1153 (9th Cir.), *cert. denied*, 121 S. Ct. 208 (2000), after this Court ruled against the defendant and issued its mandate, the defendant's counsel missed the deadline to file a petition for *certiorari* in the Supreme Court. To permit the defendant to file his *certiorari* petition, the Court relieved him of his attorney's procedural default by recalling the mandate, vacating the prior decision, and then reissuing the decision verbatim. *See id.* at 1155.

Other circuits have shown similar leniency in excusing parties from their attorneys' failures to perfect appeals. *In McHale v. United States*, 175 F.3d 115 (2d Cir. 1999), the defendant's counsel filed a timely notice of appeal but then failed to submit a brief and appendix prior to the court-imposed scheduling deadline. The court then dismissed the appeal for failure to prosecute, and the defendant filed a section 2255 motion to vacate his sentence on the ground of ineffective assistance of appellate counsel. The district court denied the petition, and the defendant appealed. The court of appeals held that section 2255 relief was inappropriate but that the court instead would recall its mandate and reinstate the appeal:

> In the pending case, we are concerned, not with a failure to file an appeal, but with a failure to pursue a properly filed appeal. . . . [M]ost clients will expect their appellate lawyer to take all necessary steps to perfect a filed appeal and will not normally request the lawyer to do so. . . . [W]e have jurisdiction to recall our mandate dismissing McHale's direct appeal for failure to prosecute and to reinstate that appeal. . . . [W]e have used this procedure to relieve a party of an appellate default. . . .

Id. at 119-20; *see also United States v. Winterhalder*, 724 F.2d 109 (10th Cir. 1983) (where defendant's counsel filed timely notice appeal and where appeal was dismissed for failure to prosecute, recalling mandate and reinstating appeal).

The situation here is similar to those in which this Court and other courts have recalled their mandate to reinstate appeals that have been dismissed because of technical procedural defaults resulting from the neglect of appellate counsel. As in those cases, the Court should recall its mandate so that it can prevent an injustice and adjudicate the petition on the merits.

C. The Court Should Consolidate This Petition With The Petition For Review Of The BIA's Denial Of Petitioner's Asylum Claim.

Once the Court recalls its mandate and reinstates the petition, it should consolidate the petition with Petitioner's original petition for review relating to his asylum claim. Consolidation will permit adjudication of the asylum claim in conjunction with the motion to reopen, will permit the Court to consider all relevant evidence, and will conserve judicial resources.

IV. CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Court recall its mandate, reinstate the petition for review, and consolidate the petition with the petition for review of the denial of Petitioner's asylum claim.

Dated: May 16, 2001

SCOTT D. WIENER
Scott D. Wiener

HELLER EHRMAN WHITE
& MCAULIFFE LLP
333 Bush Street
San Francisco, CA 94104

Attorneys for Petitioner
Fredy Orlando Ventura

STATEMENT OF RELATED CASE

Pursuant to Rule 28-2.6 of the Ninth Circuit Local Rules, counsel for Petitioner states that a related case—*Fredy Orlando Ventura v. Immigration and Naturalization Service,* Case No. 99-71004—is currently pending before the Court and is set for argument on June 13, 2001.

Dated: May 16, 2001

SCOTT D. WIENER
Scott D. Wiener

HELLER EHRMAN WHITE
& MCAULIFFE LLP
333 Bush Street
San Francisco, CA 94104

Attorneys for Petitioner
Fredy Orlando Ventura

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Local Rule 32-1, I certify that the above motion:

1. Is proportionately spaced using Times New Roman typeface;

2. Has a typeface of 14 points;

3. Contains 2,418 words; and

4. Does not exceed 40 pages

Dated: May 16, 2001

SCOTT D. WIENER
Scott D. Wiener

HELLER EHRMAN WHITE
& MCAULIFFE LLP
333 Bush Street
San Francisco, CA 94104

Attorneys for Petitioner
Fredy Orlando Ventura

PROOF OF SERVICE BY MAIL

I, Orapin Eskridge, declare as follows:

I am employed with the law firm of HELLER, EHRMAN, WHITE & MCAULIFFE LLP, whose address is 333 Bush Street, San Francisco, California 94104-2878. I am readily familiar with the business practices of this office for collection and processing of correspondence for mailing with the United States Postal Service; I am over the age of eighteen years and not a party to this action.

On May 16, 2001, I served the following:

MOTION TO RECALL MANDATE, TO REINSTATE PETITION FOR REVIEW, AND TO CONSOLIDATE WITH CASE NO. 99-71004

on the below parties in this action by placing true copies thereof in sealed envelopes, addressed as shown, for collection and mailing pursuant to the ordinary business practice of this office which is that correspondence for mailing is collected and deposited with the United States Postal Service on the same day in the ordinary course of business:

James A. Hunolt
Office of Immigration Litigation
Civil Division, Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, DC 20044
(202) 616-4876

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Francisco, California on May 16, 2001.

ORAPIN ESKRIDGE
Orapin Eskridge

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A72 688 860 - San Francisco

Date: February 24, 2000

In re: FREDY ORLANDO *VENTURA*

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:

Jan Austerlitz, Esquire
405 14th Street, #1600
Oakland, California 94612

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act
[8 U.S.C. § 1251(a)(1)(B)]—
Entered without inspection

APPLICATION: Reopening; remand

ORDER:

PER CURIAM. This case was previously before this Board on July 19, 1999, when we dismissed the respondent's appeal from an Immigration Judge's decision denying the respondent's applications for asylum and

withholding of deportation under sections 208(a) and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a), 1253(h). On August 26, 1999, the respondent filed a motion to reopen the proceedings asserting that new evidence previously unavailable supports the respondent's claim that he has a well-founded fear of persecution by the guerillas on account of his political opinion. The motion to reopen and remand for further proceedings is denied.

A motion to reopen will not be granted if the respondent does not establish a prima facie case of eligibility for the underlying relief sought. *See INS v. Abudu*, 485 U.S. 94 (1988); *INS v. John Ha Wang*, 450 U.S. 139 (1981). Where an alien has already had an opportunity to fully present and litigate his request for discretionary relief from deportation, a party seeking a motion to reopen proceedings for further consideration of the same form of relief bears a "heavy burden" of proving that the new evidence presented "would likely change the result in the case." *Matter of Coehlo*, 20 I&N Dec. 464, 473 (BIA 1992).

In the present case, the respondent seeks to reopen based upon evidence that his two brothers were found murdered in Guatemala 2 months after the respondent's deportation hearing concluded. The respondent further submits that his family fled their home in Guatemala due to death threats they received. The documentary evidence submitted with the motion consists of copies of the certificates for his two brothers, a copy of an army identification card belonging to the respondent's cousin, and a sworn declaration from the respondent.

We find that the respondent has not met the "heavy burden" of showing that this new evidence would likely change the result of his case. There is no evidence of who murdered his brothers and why. Nor is there any evidence of who threatened his family. The respondent

implies in his brief that the threat his father received was from the same people who killed the respondent's brothers. But there is no evidence to show a link between the murder of the respondent's brothers, the threats to his family and the fear of the guerillas held by the respondent. Attacks on family members do not necessarily establish a well-founded fear of persecution absent a pattern of persecution tied to the respondent. *See Prasad v. INS*, 47 F.3d 336, 340 (9th Cir. 1995); *Arriaga-Berrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991). We note that the record contains evidence that since the signing of the peace accords, the level of crime and violence in Guatemala is higher than in the recent past, and the "underlying motivation in most asylum cases now appears to stem from common crime and/or personal vengeance." Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Guatemala - Profile of Asylum Claims & Country Conditions* Part Three, III (June 1997) (Exh. 6). Without more, these incidents appear to be a result of the general conditions of violence and civil unrest in Guatemala, and the respondent's resultant fear of these conditions, however compelling, does not alone substantiate a "well-founded fear of persecution" within the meaning of those terms in the Act. *See INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *Osorio v. INS*, 99 F.3d 928 (9th Cir. 1996); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

Accordingly, we find that the respondent has failed to demonstrate that reopening is warranted as he has not set forth a *prima facie* case for eligibility for the relief sought. *See* 8 C.F.R. §§ 208.13 and 208.16(c); *INS v. Abudu, supra; Matter of Coehlo, supra.*

/s/ [INSERT NAME]
FOR THE BOARD

CERTIFICATE OF SERVICE

I, Jan Austerlitz, certify that I am over 18 years of age and that on March 21, 2000, I mailed copies of the Petition for Review in the case of Fredy Orlando Ventura (A72 688 860) to the following:

Attorney General
Office of Immigration Litigation
Dept. of Justice
Washington, D.C. 20530

District Director
INS
630 Sansome Street
San Francisco, CA 94111

Dated: March 21, 2000 JAN AUSTERLITZ
Jan Austerlitz

Supreme Court, U.S.
FILED
SEP 10 2002
OFFICE OF THE CLERK

(3)

No. 02-29

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

FREDY ORLANDO VENTURA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

THEODORE B. OLSON
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In the Supreme Court of the United States

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IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

FREDY ORLANDO VENTURA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The petitions in this case and *INS* v. *Chen*, No. 02-25 (filed July 3, 2002), show that, in these cases and a large number of other cases involving claims for asylum and withholding of removal, the Ninth Circuit has overstepped the limits of its authority when reviewing decisions of the Board of Immigration Appeals (BIA). The petitions explain that when a court of appeals rejects the BIA's particular ground for finding that an asylum applicant failed to establish past persecution based upon a protected characteristic, the court should remand to the BIA for further proceedings, rather than itself adjudicating the applicant's eligibility for relief. The Ninth Circuit's repeated disregard for that rule puts it in conflict with decisions of this Court and of other courts of appeals. See Pet. 10-13; *Chen* Pet. 20-27. For these reasons, and in light of the substantial number of asylum cases that

arise in the Ninth Circuit (see *Chen* Pet. 29; *Chen* Reply Br. 10), certiorari is warranted.

1. a. Respondent asserts that reviewing courts have broad discretion to decide in the first instance issues that the BIA reasonably determined not to address. Br. in Opp. 7-11. According to respondent, the courts of appeals should "balance the benefits of deference [to the BIA] against the costs of deference," and should remand to the BIA only if they perceive that the "benefits" of further administrative proceedings outweigh the "costs" of such proceedings in the particular case. *Id.* at 8, 10-11, 13, 14. Thus, respondent says (*id.* at 6) that the Ninth Circuit is correct in deciding for itself whether it "is really worth it" to respect Congress's assignment of asylum and removal issues to the Attorney General and his delegates at the BIA, as well as Congress's assignment to the courts of only limited judicial review.

Respondent is mistaken. As this Court has held, the role of the courts in cases involving judicial review of agency action "is limited to considering whether the announced grounds for the agency decision comport with the applicable legal principles." *Port of Portland* v. *United States*, 408 U.S. 811, 842 (1972) (citing *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943)). "[T]he guiding principle" in cases such as this "is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).

Respondent points (Br. in Opp. 7-8) to this Court's acknowledgment that there may be isolated situations that warrant judicial resolution of an issue within an agency's jurisdiction. See *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985); *Idaho Power Co.*, 344 U.S. at 20. But that exception applies only in "rare circumstances," *Lorion*, 470 U.S. at 744, such as when the agency has manifestly demonstrated an unwillingness or inability to fulfill its

congressionally assigned responsibilities, and there is no other remedy available to the reviewing court. See, *e.g.*, *Bridge* v. *United States Parole Comm'n*, 981 F.2d 97, 106 (3d Cir. 1992) (remand required when district court overturns parole decision unless Parole Commission has demonstrated "repeated resistance to following court orders" in the case).[1]

Only "extraordinary circumstances" can justify judicial usurpation of an administrative agency's decision-making role. *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 792 (1978) (quoting *Idaho Power Co.*, 344 U.S. at 20). Yet in a fast-growing line of asylum decisions, the Ninth Circuit has routinely decided contested issues that are assigned by statute and regulation to the BIA but have not yet been addressed by the BIA in the particular case. See *Chen* Pet. 22-24 (discussing recent Ninth Circuit decisions); see also, *e.g.*, *Popp* v. *INS*, 41 Fed. Appx. 146 (July 12, 2002) (unpublished decision); *Santos-Diaz* v. *INS*, 41 Fed. Appx. 95 (July 9, 2002) (unpublished decision); *Cardenas* v. *INS*, 294 F.3d 1062 (9th Cir. June 12, 2002); *Silva-Jacinto* v. *INS*, 37 Fed. Appx. 302 (9th Cir. June 11, 2002) (unpublished decision), petition for cert. pending, No. 02-377 (filed Sept. 9, 2002); *Singh* v. *INS*, 35 Fed. Appx. 582 (May 22, 2002) (unpublished decision); *Rios* v. *Ashcroft*, 287 F.3d 895 (9th

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[1] Even an extraordinary need for speedy resolution of a substantive issue generally does not justify its disposition by the reviewing court, particularly because other remedial options that do not intrude as greatly upon the agency's assigned functions may be available. See, *e.g.*, *National Treasury Employees Union* v. *Horner*, 854 F.2d 490, 499-501 (D.C. Cir. 1988) (requiring district court to set schedule for agency action). In the immigration context, moreover, the alien cannot be removed unless and until a final order of removal has been entered by the BIA following the remand. An asylum applicant is thereby protected for the duration of the administrative proceeding from the persecution he alleges. As a result, an asylum case would rarely present an extraordinary need for speedy resolution from the alien's perspective.

Cir. May 1, 2002); *Salazar-Paucar* v. *INS*, 281 F.3d 1069 (9th Cir. Feb. 28, 2002), opinion amended, 290 F.3d 964 (9th Cir. May 9, 2002). The Ninth Circuit has done so, moreover, based upon nothing more than its own assessment of the evidence that the record then contained. In this case, for example, the court of appeals "conclude[d] that remand * * * is inappropriate because the INS's evidence of changed country conditions clearly demonstrates that the presumption of a well-founded fear of future persecution was not rebutted." Pet. App. 11a. Thus, the only feature of this case that the court of appeals identified as purported justification for denying the BIA the opportunity to address an unresolved question within the BIA's authority was that the court was confident of its *own* ability to determine the correct result. Cf. *Chen* Pet. App. 11a.[2]

The petition in *Chen* explains (at 24) why the Ninth Circuit's approach is inconsistent with separation of powers principles and fundamental principles of administrative law. Congress has expressly entrusted decision-making over immigration matters in general and over asylum matters in particular to the Attorney General and his delegates. 8 U.S.C. 1103, 1158; *Chen* Pet. 21-22, 25. At the most basic level, a court of appeals, in reviewing the record to make a de novo finding on a factual issue in the first instance, might overlook or fail to appreciate the signifance of evidence in the record that cuts against its conclusion. In this very case, for example, the court failed to recognize that the 1997 State Department report on which it relied when concluding that

[2] Respondent notes (Br. in Opp. 2, 11-12) that the Ninth Circuit has remanded some asylum cases after reversing the BIA's decision. But respondent agrees that the court of appeals has adopted the rule challenged in the petition—that the court will not remand to the BIA when the court (based on its own review of the administrative record in the first instance, without the benefit of the BIA's expert review) deems it "sufficiently clear" that "only one resolution of the issue is possible." *Id.* at 12-13.

the INS had not rebutted the presumption of future persecution, stated that (even at that time) only political party leaders or high-profile activists would be vulnerable to harassment, and then only in their home communities, making relocation within Guatemala viable. Pet. 12-13.

Furthermore, an unresolved question in an asylum case may often implicate significant policy considerations within the Attorney General's assigned field of authority, such that "a judicial judgment cannot be made to do service for an administrative judgment." *Chenery*, 318 U.S. at 88; see *ibid.* ("[A]n appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."). Likewise, a court of appeals—which lacks specialized expertise in the immigration area—might be insensitive to broader factual or legal considerations of which the Attorney General (or the BIA on his behalf) would be aware. See *Chen* Pet. 24.

Finally, the Ninth Circuit's approach assumes that, if a case were remanded, the BIA would render its decision on the administrative record that was originally assembled by the immigration judge and BIA and that is before the court on judicial review. But that often would not be true—especially in an asylum or withholding-of-removal case, in which up-to-date information concerning conditions in the alien's home country becomes highly relevant if (as the Ninth Circuit concluded in this case) the alien has established past persecution in that country.[3] See *Chen* Pet. 24, 25-26. As the petition in *Chen* also notes (*id.* at 28), such considerations in support of a remand have particular force

[3] In this case, for example, the Ninth Circuit resolved the question of whether respondent would face a well-founded fear or threat of persecution in the future if he was returned to Guatemala, based on the State Department report concerning conditions in that country in 1997, more than five years ago. See Pet. 12-13; Pet. App. 11a-12a.

in asylum proceedings because those proceedings implicate foreign affairs, national defense, and immigration and naturalization policy.

b. Respondent confuses cases such as this—where a court's review of *an agency's original decision* gives rise to a new issue that the agency had not considered—with "primary jurisdiction" cases in which courts suspend their *own* original proceedings and refer a subsidiary question to an administrative agency that possesses special competence. Br. in Opp. 7-11; see, *e.g.*, *Reiter* v. *Cooper*, 507 U.S. 258, 268-269 (1993); *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956). The two situations, however, are fundamentally different. Primary jurisdiction doctrine "applies where the administrative agency cannot provide a means of complete redress to the complaining party and yet the dispute involves issues that are clearly better resolved in the first instance by the administrative agency." 2 Am. Jur. 2d *Administrative Law* § 513, at 501 (1994). Because it is always true in primary jurisdiction cases that Congress has not entrusted the relevant subject matter exclusively to an agency (see *Reiter*, 507 U.S. at 268), courts have considerable latitude when deciding whether to make an administrative referral. "In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Western Pac. R.R.*, 352 U.S. at 64.

By contrast, in cases involving judicial review of agency action, the rule requiring a remand after the reviewing court has ascertained a legal error by the agency is mandated by Congress's assignment of decision-making responsibility to the agency. "[A]n administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *FCC* v. *Pottsville Broad. Co.*, 309

U.S. 134, 145 (1940). Therefore, when the reviewing court decides the correct final result, the court "usurp[s]" a congressionally delegated administrative function. *Idaho Power Co.*, 344 U.S. at 20.

2. Respondent contends that the Ninth Circuit's approach does not create a circuit split. Br. in Opp. 11-13. He is again mistaken. The Seventh Circuit, for example, "will not weigh evidence that the [BIA] has not previously considered," because "an appellate court is not the appropriate forum to engage in fact-finding in the first instance." *Rhoa-Zamora* v. *INS*, 971 F.2d 26, 34 (1992), cert. denied, 507 U.S. 1050 and 508 U.S. 906 (1993). Likewise, the First Circuit recognizes that remanding to the BIA "is the appropriate remedy when * * * [the BIA] has failed to offer legally sufficient reasons for its decision." *Gailius* v. *INS*, 147 F.3d 34, 47 (1st Cir. 1998). Decisions of the Second, Third, and Fourth Circuits are in accord. See Pet. 11-12; see also *Gao* v. *Ashcroft*, 299 F.3d 266, 279 (3d Cir. 2002) (holding —after reversing adverse credibility determination—that "this case must be remanded," and noting that court "will leave [the assessment of other evidence] to the fact-finder").

The appellate decisions that respondent says are consistent with the Ninth Circuit's approach (Br. in Opp. 9-10) are inapposite. None involved an asylum decision by the BIA, or any other immigration issue. Indeed, most addressed only the distinct primary-jurisdiction question of whether to make a referral of an issue that arises in an original judicial action. See cases cited at *id.* at 9. The two appellate cases that do involve judicial review of agency action are likewise beside the point. In one, the Eighth Circuit declined to remand a case back to the *district court* after the court of appeals concluded that the existing record was sufficient to *uphold* an agency decision. See *Central S.D. Coop. Grazing Dist.* v. *Secretary of the United States Dep't of Agric.*, 266 F.3d 889, 895 n.8 (8th Cir. 2001). In the

other—which was in any event vacated by the Fifth Circuit en banc—a panel of that court determined that a district court's consideration of materials outside the agency record was consistent with *Lorion*, where the agency "had made no findings * * * despite repeated requests, and the district court was forced to do so itself." *Sierra Club* v. *Peterson*, 185 F.3d 349, 369-370 (1999), reh'g en banc granted, 204 F.3d 580, opinion vacated, 228 F.3d 559, 565 (5th Cir. 2000), cert. denied, 532 U.S. 1051 (2001).

3. Respondent suggests (Br. in Opp. 15) that the petition presents only the fact-bound question of whether the administrative record in this case "did, indeed, provide a factual basis for the BIA to come to a different conclusion [about respondent's eligibility for asylum and entitlement to withholding of deportation] than the court." That is not the issue before this Court. It is immaterial for purposes of the petition whether—if the case had been remanded—the BIA would have reached the same conclusion as the court of appeals. The significant point is that the court of appeals denied the BIA the opportunity to decide an important immigration issue that is assigned to it by statute and regulation, and to update the record on conditions in Guatemala when doing so. This Court need not consider the merits of respondent's asylum application in order to correct the Ninth Circuit's error.

4. Respondent asks the Court to take "judicial notice" of a motion to reopen the BIA's proceedings that he filed in 1999, and of his ensuing petition for judicial review of the BIA's denial of that motion. Br. in Opp. 5 n.2; see Br. in Opp. App. 1a-21a. The 1999 motion to reopen cited events that occurred shortly after the 1998 evidentiary hearing in respondent's case. See Br. in Opp. App. 19a. Respondent suggests that the BIA's denial of his motion to reopen shows that the BIA would not have considered supplementing the administrative record if the Ninth Circuit had remanded this

case. See Br. in Opp. 14. But respondent's suggestion is belied by the BIA's order denying respondent's 1999 motion.

In the order denying reopening, the BIA—rather than declining to consider respondent's new evidence—determined that respondent had not met his burden of showing that "this new evidence would likely change the result of his case." Br. in Opp. App. 19a. The BIA explained that respondent's new evidence did not suggest a danger of political persecution by guerillas if respondent were returned to Guatemala, but only that respondent's family had suffered from violence in Guatemala, apparently as "a result of the general conditions of violence and civil unrest." *Id.* at 20a. The BIA therefore *did* consider petitioner's post-hearing evidence. And the BIA would be free to consider that evidence once again, along with any other evidence respondent and the INS might introduce, if the case is remanded to the BIA in accordance with established principles of judicial review of agency action. Respondent's evidence, moreover, related solely to events in Guatemala during the 1990s. It therefore could not resolve in remand proceedings the question of whether, in light of *current* conditions in Guatemala, respondent *now* has a well-founded fear of persecution (to be eligible for asylum) or *now* would face a clear probability of persecution (to be eligible for withholding of deportation) if he is returned to that country.

* * * * *

The petition for a writ of certiorari should be granted and the case should be consolidated for oral argument with *INS* v. *Chen*, petition for cert. pending, No. 02-25 (filed July 3, 2002).[4] In the alternative, the petition should be held

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[4] Respondent does not dispute the petition's demonstration (Pet. 13-14) that consolidation with *Chen* is warranted if the Court grants certiorari in this case.

pending this Court's disposition of the petition in *Chen*, and then should be disposed of as appropriate in light of the final disposition of that case.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

SEPTEMBER 2002

Per Curiam

SUPREME COURT OF THE UNITED STATES

IMMIGRATION AND NATURALIZATION SERVICE *v.* FREDY ORLANDO VENTURA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02–29. Decided November 4, 2002

PER CURIAM.

Federal statutes authorize the Attorney General, in his discretion, to grant asylum to an alien who demonstrates "persecution or a well-founded fear of persecution . . . on account of . . . [a] political opinion," and they require the Attorney General to withhold deportation where the alien's "life or freedom would be threatened" for that reason. Immigration and Nationality Act, §§101(a)(42)(A), 208(a), 243(h), 66 Stat. 166, as amended, 8 U. S. C. §§1101(a)(42), 1158(a), 1253(h)(1) (1994 ed. and Supp. V). The Board of Immigration Appeals (BIA) determined that respondent Fredy Orlando Ventura failed to qualify for this statutory protection because any persecution that he faced when he left Guatemala in 1993 was not "*on account of*" a "*political opinion.*" The Court of Appeals for the Ninth Circuit reversed the BIA's holding. 264 F. 3d 1150 (2001) (emphasis added).

The Court of Appeals then went on to consider an alternative argument that the Government had made before the Immigration Judge, namely, that Orlando Ventura failed to qualify for protection regardless of past persecution because conditions in Guatemala had improved to the point where no realistic threat of persecution currently existed. Both sides pointed out to the Ninth Circuit that the Immigration Judge had held that conditions had indeed changed to that point but that the BIA itself had not considered this alternative claim. And both sides asked that the Ninth Circuit remand the case to the BIA

so that it might do so. See Brief for Petitioner in No. 99–71004 (CA9), pp. 5, 6, 24; Brief for Respondent in No. 99–71004 (CA9), pp. 8, 9, 23.

The Court of Appeals, however, did not remand the case. Instead, it evaluated the Government's claim itself. And it decided the matter in Orlando Ventura's favor, holding that the evidence in the record failed to show sufficient change. 264 F. 3d, at 1157–1158. The Government, seeking certiorari here, argues that the Court of Appeals exceeded its legal authority when it decided the "changed circumstances" matter on its own. We agree with the Government that the Court of Appeals should have remanded the case to the BIA. And we summarily reverse its decision not to do so.

I

We shall describe the basic proceedings so far. In 1993 Orlando Ventura, a citizen of Guatemala, entered the United States illegally. In 1995 the Attorney General began deportation proceedings. And in 1998 an Immigration Judge considered Orlando Ventura's application for asylum and withholding of deportation, an application based upon a fear and threat of persecution "on account of" a "political opinion." 8 U. S. C. §§1101(a)(42)(A), 1253(h) (1994 ed. and Supp. V). Orlando Ventura testified that he had received threats of death or harm unless he joined the guerrilla army, that his family members had close ties to the Guatemalan military, and that, in his view, the guerrillas consequently believed he held inimical political opinions.

The Immigration Judge denied relief. She recognized that Orlando Ventura subjectively believed that the guerrillas' interest in him was politically based. And she credited testimony showing (a) that Orlando Ventura's family had many connections to the military, (b) that he was very close to one cousin, an army lieutenant who had served for almost 12 years, (c) that in 1987 his uncle, a local military commissioner responsible for recruiting, was attacked by people with machetes, and (d) that in 1988 his cousin (a soldier) and the cousin's brother (a civilian) were both shot at and the soldier-cousin killed. Nonetheless, Orlando Ventura had failed objectively "to demonstrate that the guerillas' interest" in him was "on account of his political opinion." App. to Pet. for Cert. 22a. The Immigration Judge added that "conditions" in Guatemala had changed significantly. Even "if the guerillas" once had had a politically based "interest" in Orlando Ventura, the evidence failed to show that the guerrillas would "continue to have motivation and inclination to persecute him in the future." *Ibid.*

The BIA, considering the matter *de novo*, "agree[d]" with the Immigration Judge that Orlando Ventura "did not meet his burden of establishing that he faces persecution 'on account of' a qualifying ground . . . ." *Id.*, at 15a. The BIA added that it "need not address" the question of "changed country conditions." *Ibid.*

The Court of Appeals, reviewing the BIA's decision, decided that this evidence "*compel[led]*" it to reject the BIA's conclusion. 264 F. 3d, at 1154 (emphasis added); see *INS* v. *Elias-Zacarias*, 502 U. S. 478, 481, n. 1 (1992) ("To reverse the BIA finding we must find that the evidence not only *supports* that conclusion, bu⁺ *compels* it . . . " (emphasis in original)). It recognized that the BIA had not decided the "changed circumstances" question and that "generally" a court should remand to permit that consideration. 264 F. 3d, at 1157. Cf. *Castillo* v. *INS*, 951 F. 2d 1117, 1120–1121 (CA9 1991) (specifying that the court of appeals must review the decision of the BIA, not the underlying decision of the immigration judge). But the Court of Appeals added that it need "not remand . . . when it is clear that we would be compelled to reverse the BIA's decision if the BIA decided the matter against the appli-

cant." 264 F. 3d, at 1157. And it held that the record evidence, namely, a 1997 State Department report about Guatemala, "clearly demonstrates that the presumption of a well-founded fear of future persecution was not rebutted." *Ibid.* Hence, it concluded, "remand . . . is inappropriate." *Ibid.*

The Government challenges the decision not to remand. And it says the matter is important. The "error," it says, is a "recurring error [that] puts the Ninth Circuit in conflict with other courts of appeals, which generally respect the BIA's role as fact-finder by remanding to the BIA in similar situations." Pet. for Cert. 11. See also Pet. for Cert. in *INS* v. *Chen*, O. T. 2002, No. 25, p. 23 (referring to eight other recent decisions from the Court of Appeals for the Ninth Circuit, which, in the Government's view, demonstrate this trend). After examining the record, we find that well-established principles of administrative law did require the Court of Appeals to remand the "changed circumstances" question to the BIA.

II

No one disputes the basic legal principles that govern remand. Within broad limits the law entrusts the agency to make the basic asylum eligibility decision here in question. *E.g.*, 8 U. S. C. §1158(a); 8 U. S. C. §1253(h)(1) (1994 ed.); *Elias-Zacarias*, *supra*, at 481; *INS* v. *Aguirre-Aguirre*, 526 U. S. 415 (1999). See also 8 CFR §3.1 (2002). In such circumstances a "judicial judgment cannot be made to do service for an administrative judgment." *SEC* v. *Chenery Corp.*, 318 U. S. 80, 88 (1943). Nor can an "appellate court . . . intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Ibid.* A court of appeals "is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co.* v. *Lorion*, 470 U. S. 729, 744 (1985). Rather, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Ibid.* Cf. *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947) (describing the reasons for remand).

Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands. This principle has obvious importance in the immigration context. The BIA has not yet considered the "changed circumstances" issue. And every consideration that classically supports the law's ordinary remand requirement does so here. The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides.

These basic considerations indicate that the Court of Appeals committed clear error here. It seriously disregarded the agency's legally-mandated role. Instead, it independently created potentially far-reaching legal precedent about the significance of political change in Guatemala, a highly complex and sensitive matter. And it did so without giving the BIA the opportunity to address the matter in the first instance in light of its own expertise.

The Court of Appeals rested its conclusion upon its belief that the basic record evidence on the matter—the 1997 State Department report about Guatemala—compelled a finding of insufficiently changed circumstances. But that foundation is legally inadequate for two reasons. First, the State Department report is, at most, ambiguous about the matter. The bulk of the report makes clear that considerable change has occurred. The report says, for example, that in December 1996 the Guatemalan Government and the guerrillas signed a peace agreement, that

in March 1996 there was a cease fire, that the guerrillas then disbanded as a fighting force, that "the guerrillas renounced the use of force to achieve political goals," and that "there was [a] marked improvement in the overall human rights situation." Bureau of Democracy, Human Rights and Labor, U. S. Dept. of State, Guatemala—Profile of Asylum Claims & Country Conditions 2–4 (June 1997).

As the Court of Appeals stressed, two parts of the report can be read to the contrary. They say that (1) even "after the March cease-fire, guerrillas continued to employ death threats" and (2) "the level of crime and violence now seems to be higher than in the recent past." *Id.*, at 3–4. Yet the report itself qualifies these statements. As to the second, the report (as the Court of Appeals noted) says: "*Although* the level of crime and violence now seems to be higher than in the recent past, *the underlying motivation in most asylum cases now appears to stem from common crime and/or personal vengeance*," *i.e.*, not politics. *Id.*, at 4 (emphasis added). And the report (in sections to which the Court of Appeals did not refer) adds that in the context of claims based on political opinion, in "our experience, only party leaders or high-profile activists generally would be vulnerable to such harassment and usually only in their home communities." *Id.*, at 8. This latter phrase "only in their home communities" is particularly important in light of the fact that an individual who can relocate safely within his home country ordinarily cannot qualify for asylum here. See 8 CFR §208.13(b)(1)(i) (2002).

Second, remand could lead to the presentation of further evidence of current circumstances in Guatemala—evidence that may well prove enlightening given the five years that have elapsed since the report was written. See §§3.1, 3.2 (permitting the BIA to reopen the record and to remand to the Immigration Judge as appropriate).

III

We conclude that the Court of Appeals should have applied the ordinary "remand" rule. We grant the Government's petition for certiorari. We reverse the judgment of the Court of Appeals for the Ninth Circuit insofar as it denies remand to the agency. And we remand the case for further proceedings consistent with this opinion.

So ordered.